88-1648

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION

Petitioner,

v.

ROBERT T. NANCE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

F. NASH BILISOLY
VANDEVENTER, BLACK, MEREDITH & MARTIN
500 World Trade Center
Norfolk, VA 23510
(804) 446-8600
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. In a matter brought pursuant to 33 U.S.C. §948a of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901 et seq., alleging employment discrimination against an employee for having filed a claim under that Act, can generalized animus alone support a finding of discrimination despite a finding of no specific intent to discriminate against the particular employee?

2. Are employers prohibited from negotiating a waiver of remedial employment rights with injured employees covered under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the petitioner, Norfolk Shipbuilding & Drydock Corporation and the respondent, Robert T. Nance. The Director, Office of Workers Compensation Programs, United States Department of Labor, was a party before the Benefits Review Board but did not participate before the Court of Appeals for the Fourth Circuit.

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OPINIONS BELOW

Administrative Law Judge:

Nance v. Norfolk Shipbuilding & Drydock Corporation, 19 BRBS 115 (1986).[1]

Benefits Review Board:

Nance v. Norfolk Shipbuilding & Drydock Corporation, 20 BRBS 109 (1987).[2]

U.S. Court of Appeals:

Norfolk Shipbuilding & Drydock Corporation v. Nance, 858 F.2d 182, 21 BRBS 166 (CRT) (4th Cir. 1988),[3] *rehearing denied, suggestion for rehearing in banc denied,* Record No. 87-3892 (4th Cir. January 9, 1989).[4]

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[1] Benefits Review Board Service (Matthew Bender); App. p. 22a.

[2] App. p. 16a.

[3] App. p. 2a.

[4] App. p. 1a.

JURISDICTIONAL STATEMENT

I. The petitioner herein seeks to review the opinion of the United States Court of Appeals for the Fourth Circuit enforcing the prior decision of the Benefits Review Board. The date of the judgment sought to be reviewed is *September 27, 1988.*

II. The United States Court of Appeals for the Fourth Circuit denied petitioner's Petition for Rehearing and Suggestion for Rehearing in banc on *January 9, 1989.*

III. The statutory provision believed by the petitioner to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. §1254(1).

STATUTE INVOLVED IN DECISION

In pertinent part, 33 U.S.C. § 948a provides as follows:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a pro- ceeding under this Act. Any employer who violates this section shall be liable to a penalty of not less than $100 or more than $1,000, as may be determined by the deputy commissioner. All such penalties shall be paid to the deputy commissioner for deposit in the special fund as described in section 44, and if not paid may be recovered in a civil action brought in the appropriate United States district court. Any employee so discriminated against shall be restored to his employment and shall be compensated by this employer for any loss of wages arising out of such discrimination: Provided, That if such employee shall cease to be qualified to perform his duties of his employment, he shall not be entitled to such restoration and compensation....

IN THE

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NORFOLK SHIPBUILDING & DRYDOCK CORPORATION

Petitioner,

v.

ROBERT T. NANCE,

Respondent.

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PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Robert T. Nance, Sr. (Nance) was an employee of Norfolk Shipbuilding & Drydock Corporation (Norfolk Ship). Between 1975 and 1981, Nance filed claims for benefits under the Longshore and Harbor Workers' Compensation Act[5] (LHWCA) relating to four injuries

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[5] 33 U.S.C. § *901 et seq.*

allegedly sustained during his employment. He also filed a claim under Section 49 of the same Act,[6] a grievance through his union and a claim under the Age Discrimination in Employment Act[7] (ADEA), all emanating from a layoff in March of 1982 (App. pp. 23a-24a).

During the pendency of these claims, Nance, represented by counsel, entered into settlement negotiations with Norfolk Ship regarding all of the claims mentioned (App. p. 24a).

During the settlement negotiations, Norfolk Ship proposed that the claimant accept a lump sum payment of $25,000.00 plus his attorney's fees and that Nance voluntarily quit his employment with Norfolk Ship in return for a release of liability on all of the claims (App. pp. 25a-30a). Norfolk Ship believed, and all courts below have so found, that Nance agreed to these terms (App. p. 34a). Nance argued that he did not agree to the voluntary quit portion of the settlement and the courts below have held that no *enforceable* agreement was reached.

Pursuant to the applicable regulations,[8] the proposed settlement was submitted to the Office of Workers' Compensation Programs, Department of Labor (OWCP), for approval. Although Norfolk Ship has consistently contended that the voluntary quit provision of the agreement was included in the Petition to the OWCP and approved, all lower Courts have held that it was not and, by application of the Parol Evidence Rule, have prohibited Norfolk Ship from introducing oral evidence that it was.

Subsequent to the approval by the OWCP, Norfolk Ship paid the settlement funds and processed Nance's voluntary quit, believing that he had, in fact, agreed to do so. Nance subsequently filed another claim, which is the subject of the present litigation, alleging that Norfolk Ship's termination of his employment as a part of the settlement constituted a violation of Section 49 of the LHWCA. The matter was heard before an Administrative Law

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[6] 33 U.S.C. § 948 (a)

[7] 29 U.S.C. §§ 621 *et seq.*

[8] *See* 29 C.F.R. §§ 702.241-243

Judge who made the following findings:

1. In negotiating settlements of claims brought under the LHWCA, Norfolk Ship has a policy of requesting voluntary terminations of employment as a condition to agreement (App. p. 27a).

2. Norfolk Ship did so in this case and believed that it had reached such an agreement with Nance (App. p. 34a).

3. Although Norfolk Ship had no specific intent to discriminate against Nance, its policy of negotiating voluntary terminations of employment in settlement agreements evidenced generalized animus against compensation claimants as a class and was sufficient to sustain a violation of Section 49 (App. pp. 33a-36a).

4. Nance was ordered reinstated with full back pay and Norfolk Ship was ordered to pay a fine to the OWCP (App. p. 37a).

The Benefits Review Board affirmed the finding and further held that the LHWCA prohibits settlement terms which include a voluntary quit provision (App. p. 16a).

The matter was appealed to the United States Court of Appeals for the Fourth Circuit. A majority of the panel affirmed, holding that Norfolk Ship's "desire to enter into such an agreement" was sufficient evidence of discriminatory intent but did not reach the issue of whether voluntary terminations of employment rights may be waived in a settlement agreement. 858 F.2d 182, 187. (App. pp. 2a, 9a). The dissent disagreed with the holding on the grounds that the Administrative Law Judge's finding of no intent to discriminate against Nance himself should have resolved the issue (App. pp. 12a, n.1) and further opined that the LHWCA did not prohibit voluntary waivers of employment rights in supervised settlements (App.

pp. 12a-13a).

A suggestion for rehearing in banc was filed but was denied as five of the Judges of the Circuit voted to rehear and five voted against rehearing (App. p. 1a).

ARGUMENT

It is respectfully suggested that the Writ of Certiorari in this matter should be granted for the following reasons:

1. The majority's holding that generalized animus against a class of employees is sufficient for finding of actual discrimination against a specific employee, in the face of a finding of no specific intent to discriminate against that employee, is in conflict with its own decision in *Holliman v. Newport News Shipbuilding & Dry Dock Co.,* 852 F.2d 759 (4th Cir. 1988) and the D.C. Circuit's decisions in *Geddes v. Benefits Review Board,* 735 F.2d 1412 (D.C. Cir. 1984) *(Geddes I),* both requiring a finding of specific intent. As it will serve to immunize compensation claimants from discharge irrespective of the employer's actual motivation, the decision is also in conflict with decisions under other discrimination statutes, presents an important question of federal law and constitutes such a departure from accepted jurisprudence so as to require the exercise of this Court's supervisory power.

2. The Benefits Review Board's decision, which the majority below accepted by implication, that the LHWCA prohibits voluntary waivers of employment rights such that an employer who proposes such a term is guilty of unlawful retaliation, is in conflict with analogous authority under other anti- discrimination statutes and presents an important question of federal law which should be settled by this Court.

I. *Generalized Animus Against Claimants As A Class Is Not Sufficient Under Current Case Law to Sustain A Finding of Individualized Discrimination.*

Like minority and elderly employees, as well as those engaged in union activity, those who file workers compensation claims have a protected status: they cannot be discharged or discriminated against "because such employee has claimed or attempted to claim compensation."[9] That protected status does not mean that an employee cannot be discharged at all but only that he cannot be discharged "because" he has claimed compensation. A plaintiff's burden of proof in this regard applies to all protected classes of employees as the various statutes prohibit only discrimination which emanates from the protected status alone. The statutes do not guarantee continued employment under any circumstances, only that the employment will not be adversely affected because of the employee's membership in the protected class.[10]

The employee in this matter had asserted a myriad of claims against the employer including benefit claims for four separate injuries under the LHWCA, an age discrimination claim under the ADEA, a grievance filed pursuant to the collective bargaining agreement and a separate claim of retaliation under Section 49 of the LHWCA. Represented by counsel, the employee and the employer entered into negotiations and reached a settlement of all of the claims asserted. The employer believed that, as part of the settlement, the employee had agreed to voluntarily quit his employment and, thereupon, processed that discharge.[11]

The claimant subsequently brought a claim for retaliation under Section 49 of LHWCA as a result of that discharge, asserting that he had not agreed to voluntarily quit as part of the settlement. The Administrative Law Judge (ALJ) found as a fact that:

> The record does demonstrate that [the employer] based on oral communications with Claimant's counsel and

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[9] 33 U.S.C. § 948 (a).

[10] "[T]he mere exercise of protected rights does not immunize the employee from discahrge..." *Washington Materials, Inc. v. NLRB,* 803 F.2d 1333, 1340 (4th Cir. 1986).

[11] At the time of the settlement, the employee was on layoff status and the employer simply changed the records to indicate a voluntary quit (App. pp. 23a, 30a).

> their own outside counsel *believed* that a voluntary quit by Mr. Nance was included in the settlement.

(App. p. 34a) (emphasis supplied). Both the Benefits Review Board and the Court of Appeals accepted that finding but nonetheless ordered reinstatement and backpay due to the employer's admitted policy of attempting to secure voluntary terminations of employment in all settlement agreements. That policy was found by the ALJ to demonstrate "generalized animus against longshore claimants as a class," (App. p. 35a), and was found to be sufficient for a violation of Section 49 despite the unchallenged finding of fact that the employer had no *specific intent* to discriminate with regard to *this employee.*

The dissenting opinion in the Court of Appeals concluded that it was "irrational and arbitrary" for the majority to find discrimination in the face of a sincerely held belief that the employee had agreed to the discharge (App. pp. 12a, n.1, 15a). Such a holding, the dissent pointed out, would be in direct conflict with the Fourth Circuit's own decisions and those of other circuits requiring a finding of specific intent:

> What is critical in the present case alleging discrimination is Norfolk Ship's intent. *Holliman v. Newport News Shipbuilding and Dry Dock Co.*, 852 F.2d 759 (4th Cir. 1988). The ALJ found that Norfolk Ship believed that Nance had agreed to resign. That is the critical inquiry, and it was resolved by the ALJ.

(App. p. 12a, n.1).

The Benefits Review Board and the various courts of appeals have consistently construed Section 49 as requiring discriminatory intent in order to be actionable.[12] The Board has construed Section

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[12] *See, Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978); *Curling v. Newport News Shipbuilding and Dry Dock Co.*, 8 BRBS 770 (1978); *Dill v. Sun Shipbuilding & Dry Dock Co.*, 6 BRBS 738 (1977). *See also, Holliman v. Newport News Shipbuilding and Dry Dock Co.*, 852 F.2d 759 (4th Cir. 1988); *Geddes v. Benefits Review Board*, 735 F.2d 1412 (D.C. Cir. 1984) *(Geddes I), aff'd, Geddes v. Director, OWCP*, 851 F.2d 440 (D.C. Cir. 1988) *(Geddes II).*

49 to be consistent with decisions under the anti-discrimination provisions of the Labor Management Relations Act (LMRA), 29 U.S.C. § 158(a)(3) (4). *Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978). Section 158(a)(4) of that Act, in language almost identical to Section 49, makes it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." As the Board has pointed out, an employer under both Acts may discharge an employee for good cause, bad cause or no cause at all so long as the motivation is not punitive against either union activity or assertion of a workers' compensation claim. *Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803, 806 (1978). *See also, Southwire Co. v. NLRB*, 820 F.2d 453, (D.C. Cir. 1987); *NLRB v. Ridgeway Trucking Co.*, 622 F.2d 1222 (5th Cir. 1980).

Under the LMRA, generalized animus toward union activity is not sufficient, standing alone, to make a specific discharge unlawful. The Act has been consistently construed to require specific motivation to discriminate against the employee in question and that general bias, hostility and/or interference does not, by itself, establish such specific motivation. *NLRB v. Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217, 223 (8th Cir. 1970); *Nix v. NLRB*, 418 F.2d 1001, 1006 (5th Cir. 1969); *NLRB v. Billen Shoe Co.*, 397 F.2d 801, 803 (1st Cir. 1968); *Farmhest, Inc. v. NLRB*, 370 F.2d 1015, 1018 (8th Cir. 1967).

This construction of the LMRA has been affirmed by this Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). There, without the necessity for citation, this Court stated the law as follows:

> Under these provisions it is undisputed that if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice. *He does not violate the NLRA, however, if any antiunion animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause.*

462 U.S. at 398 (emphasis supplied). The Court thereupon

reviewed the burden of proof required once generalized animus had been determined:

> At the same time, there were decisions indicating that the presence of an antiunion motivation in a discharge case was not the end of the matter. An employer could escape the consequences of a violation by proving that without regard to the impermissible motivation, the employer would have taken the same action for wholely permissible reasons.

462 U.S. at 399 (citations omitted).

The rule is the same under Title VII.[13] Even where a pattern and practice of racial discrimination is proven, such that an inference that any particular employment decision was made in pursuit of that policy, the employer always may escape liability by demonstrating "that the individual applicant was denied an employment opportunity for lawful reasons." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362 (1977). *See also, Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773 n. 32 (1976). Once a prima facie case of discrimination is shown, the burden of production shifts to the employer to articulate lawful, nondiscriminatory reasons for the employment action:

> We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.

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[13] 42 U.S.C. §§ *2000e et seq.*

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981). If that burden of production is met, the presumption raised by the *prima facie* case is rebutted and the employee must then demonstrate that the proffered reason was not the true reason for the employment decision. *Id.* at 256. *See also, McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804-805 (1973).

The dissent below recognized the necessity for a finding of retaliatory intent to sustain a Section 49 claim, citing both its previous decision in *Holliman, supra,* and the D.C. Circuit's decision in *Geddes I, supra.* The dissent thereupon succinctly stated why the majority's decision was incorrect:

> Here, the ALJ found that Norfolk Ship believed that it had a contractual right to terminate Nance. That is conclusive proof of lack of retaliatory intent, of intent to discriminate.
>
> The ALJ (and the majority in its affirmance) instead, in a twist of logic, somehow inferred that the policy of asking for, negotiating and accepting such waivers to continued employment was tantamount to a discriminatory intent. That inference might be appropriate in a case in which there is little or no direct evidence regarding the employer's intent, but that is not the case at bar. The ALJ concluded that Norfolk Ship terminated Nance because it thought it had a contractual right to do so. To infer in the face of that finding that the termination was in retaliation for claiming compensation under the LHWCA is irrational and arbitrary and should be set aside.

(App. p. 15a). The logic of the dissenting opinion is borne out by the five to five vote on the suggestions for rehearing in banc (App. p. 1A).

The decision of the Court of Appeals is in conflict with its own decision in *Holliman, supra,* the D.C. Circuit's decision in *Geddes I, supra,* and the consistent line of decisions under the LMRA and Title VII requiring a finding of specific intent to discriminate as opposed to generalized animus against a class

of employees.

If this decision were to stand, it would effectively immunize compensation claimants from discharge and would, thus, place an intolerable burden upon employers. An example is directly before the Court: now that Norfolk Ship has been adjudicated to possess generalized animus against compensation claimants as a class, any discharge of a class member may be overturned irrespective of the actual motivation for the discharge. Such a conclusion is irrational and contrary to all precedent under this and every other anti-discrimination statute.

Accordingly, it is respectfully submitted that this Court should grant the writ of certiorari in order to resolve the conflict between the circuits and to rectify what is a clearly erroneous decision of national import. It is further respectfully submitted that the matter should be summarily reversed on the strength of the decisions cited above.

II. *The Holding That Settlement Negotiations and Agreements That Include a Waiver of Rights Under the LHWCA Are Prohibited Is Incorrect Under Applicable Case Law.*

As pointed out above, the Administrative Law Judge and the majority in the Court of Appeals found that the fact that Norfolk Ship attempts to negotiate waivers of employment rights in virtually all settlements of LHWCA claims was sufficient evidence of discriminatory intent against claimants "as a class" so as to justify a finding of discrimination in the specific discharge of Nance. The Benefits Review Board, and the dissent in the Court of Appeals, recognized that it was illogical to base a finding of discriminatory intent on a settlement proposal which was *not accepted* by the employee. The Board thus held that the policy underlying the LHWCA prohibits such agreements entirely and that the attempt to negotiate the agreement was itself retaliatory (App. pp. 20a-21a).

This issue is admittedly confusing, for the majority's conclusion was that Norfolk Ship's "desire to enter into such an agreement" (App. p. 9a), was sufficient evidence of discriminatory intent itself. However, it declined to reach the issue of whether the agreement in and of itself would be discriminatory *vel non*. There

is a highly arbitrary component to that decision as it simply does not logically follow that it would be discriminatory *per se* to request a term in a settlement agreement unless the *term itself* was prohibited.[14] Both the Board and the dissent below realized the logical necessity of determining that issue and reached opposite conclusions.[15] It is suggested that a determination that a represented, supervised and freely negotiated waiver of employment rights is prohibited *per se* by the LHWCA would be, in the words of the dissent, "at odds with the general federal policy in favor of settlements, at odds with analogous authority and at odds with the LHWCA." (App. p. 12a).

All courts which have considered the issue under other anti-discrimination statutes have found that an employee can waive his rights under those statutes so long as the waiver is voluntary and knowing. In an ADEA context, the Sixth Circuit and the Eighth Circuit have held that, not only can an employee settle cases which include waiver of remedial rights, such settlements are encouraged. *Runyan v. National Cash Register Corp.*, 787 F.2d 1039

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[14] Equally perplexing is the majority's logic in finding Norfolk Ship guilty of insisting on a settlement term which it *did not get*. It would certainly seem that, if Norfolk Ship insisted on the inclusion of the termination in the settlement agreement, then the termination *was* part of the agreement and the employee voluntarily quit. If it *was not* part of the agreement, then, logically, Norfolk Ship did not insist on the term. If Norfolk Ship did not insist on the term, then there was no evidence of animus. Accordingly, either the claimant voluntary quit pursuant to the settlement agreement or there is no evidence of animus.

[15] The dissent below stated the issue succinctly:

> It is irrational and arbitrary to conclude that Norfolk Ship discriminated against Nance while simultaneously concluding that it acted pursuant to what it believed was its contractual right. In order for such conduct to be "dicriminatory" for section 49 purposes, the acquisition itself of the contractual right and hence the belief of its existence must be forbidden. The Board recognized that logical necessity and found that the acquisition of the right is forbidden. I recognize that logical necessity *vel non* must be pursued and reach the issue but disagree with the Board's interpretation of the LHWCA.

(App. p. 12a, n.1.)

(6th Cir. in banc), *cert. denied,* 107 U.S. 178 (1986); *Moore v. McGraw Edison Co.,* 804 F.2d 1026 (8th Cir. 1986). As the Eighth Circuit stated in *Moore:*

> Consistent with *Runyan,* we believe that fact disputes of this nature *should* be compromised and settled by the plaintiffs accepting a payment of damages in a sum less than demanded and the defendant paying damages in a sum in excess of that offered. We do not believe that a settlement of a fact dispute in this fashion compromises the policies of the ADEA, in the absence of fraud, deceit, or unconscionable overreaching, and is in accordance with encouraging amicable arm's length settlement of private disputes.

804 F.2d at 1033 (emphasis supplied). *See also, Lancaster v. Buerkel Buick Honda Co.,* 809 F.2d 539 (8th Cir. 1987), *cert. denied* __ U.S. __, 107 S.Ct. 3212 (1987), which involved a termination agreement similar in principle to that at issue in this case. The Eighth Circuit there held that the unsupervised release of all claims resulting from the plaintiff's termination also released the plaintiff's statutory ADEA claim and that ordinary contract principles governed the determination of whether plaintiff's release was knowing and voluntary. Id. at 540-41. *See also, Coventry v. United States Steel Corp.,* 856 F.2d 514 (3rd Cir. 1988); *EEOC v. Cosmair, Inc.,* 821 F.2d 1085, 1090 (5th Cir. 1987).

In a Title VII setting, this Court has presumed that an employee "may waive his cause of action under Title VII as part of a voluntary settlement," so long as the settlement was voluntary and knowing. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 52, n.15 (1974). Normal contract principles will apply to such a waiver even in an unsupervised agreement. *See, Freeman v. Motor Convoy, Inc.,* 700 F.2d 1339 (11th Cir. 1983); *Fulgence v. J. Ray McDermott & Co.,* 662 F.2d 1207 (5th Cir. 1981).

Further, the EEOC has recently promulgated regulations permitting unsupervised waivers of ADEA rights so long as the waivers are knowing and voluntary. 29 C.F.R. § § 1627.16(c)(1)-(3). In assessing the validity of a waiver agreement, the regulations provide that relevant factors indicative of a knowing and voluntary

waiver will include whether the agreement was in writing, a reasonable time was provided for the employee's deliberation and the employee was encouraged to consult with an attorney. 29 C.F.R. §1627.16(c)(2).

Accordingly, no court has construed other anti-discrimination statutes to provide for "a flat prohibition on the waiver of remedial rights" as has the Board and the majority, by implication, below (App. p. 12a). Additionally, as the dissent below noted, if there is a difference between settlements involving minority and elderly employees and those involving LHWCA claimants, "that difference militates in favor of more generous court recognition of LHWCA settlements." (App. p. 13a). Settlements under the LHWCA have no force and effect until and unless they are approved by a Deputy Commissioner or Administrative Law Judge. 33 U.S.C. §§ 915, 908(i); 20 C.F.R. §§702.242(a) (b). Where Title VII and ADEA employees may waive their rights in an *unsupervised* release, LHWCA claimants cannot do so and there is, thus, far less of an opportunity for overreaching or exploitation. The Department of Labor representative charged with approving the settlement must determine whether the agreement is knowing and voluntary and is in the best interest of the employee. There is no support in any of the statutes or the regulations which would prohibit without question a voluntary termination of employment rights in an LHWCA setting.

Accordingly, it is suggested that the specific holding by the Board and the implied holding by the majority below that a waiver of employment rights in an LHWCA setting is strictly prohibited, so as to render even the negotiation of the term retaliatory, is contrary to decisions by this Court and other Circuits and serves to discourage the strong federal policy "of encouraging amicable settlement of honest differences between men dealing at arm's length with one another." Norfolk Ship therefore respectfully requests that a writ be granted on this issue to resolve the conflicts between the Circuits and to settle an important issue of national importance.

CONCLUSION

It is respectfully submitted that the courts below have interpreted the requirements for actionable discrimination under Section 49 of the LHWCA in a manner wholly at odds with previous decisions by this Court and other Circuits and that the issues should be settled by this Court by allowance of the writ.

Respectfully submitted,

F. NASH BILISOLY
VANDEVENTER, BLACK,
MEREDITH & MARTIN
500 World Trade Center
Norfolk, Virginia 23510
804-446-8600

Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Record No. 87-3892

Norfolk Shipbuilding & Drydock Corporation,

Petitioner,

v.

Robert T. Nance,

Respondent.

Decided on January 9, 1989

On Petition for Rehearing and Suggestion for Rehearing In Banc

The petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to the Court.

On the question of rehearing before the panel, Judge Murnaghan voted to rehear the case. Judges Winter and Sprouse voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Russell, Widener, Murnaghan, Chapman, and Wilkins voted to rehear the case in banc; and Judges Winter, Hall, Phillips, Sprouse, and Ervin voted against in banc rehearing. Judge Wilkinson disqualified himself from voting in the poll.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as the judges were equally divided in the poll,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Record No. 87-3892

Norfolk Shipbuilding & Drydock Corporation,

Petitioner,

v.

Robert T. Nance,

Respondent.

Argued July 6, 1988
Decided on September 27, 1988

Before WINTER, Chief Judge, and MURNAGHAN and SPROUSE, Circuit Judges.

HARRISON L. WINTER, Chief Judge:

Norfolk Shipbuilding & Drydock Corporation (Norfolk) petitions to set aside an order of the Benefits Review Board (the Board) affirming the decision and order of an Administrative Law Judge that required Norfolk to reinstate Robert T. Nance to his former position with back pay and to pay a penalty to the Deputy Commission.[1] The decision and order were entered pursuant to § 49 of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C.§ 948a (1976) (the Act)[2]. The ALJ found that Nance had proved that Norfolk retaliated against him in violation of § 49 of the Act by discharging him from his job after the parties entered

[1] Nance v. Norfolk Shipbuilding & Dry Dock Corporation, No. 86-2436, 20 Ben.Rev.Bd.Serv. (MC) 109 (Nov. 23, 1987)

[2] The statute, in pertinent part, reads as follows:

into an agreement to settle Nance's pending claims for disability compensation, age discrimination and discrimination under § 49, and a grievance to his union.

The principal questions before us are whether testimonial evidence purportedly demonstrating that Nance voluntarily agreed to quit his job as partial consideration for the settlement was erroneously excluded by the ALJ, and whether the Board erred in sustaining the ALJ's finding that Norfolk had the requisite discriminatory intent to violate § 49.

We perceive no reversible error on the part of the ALJ or the Board, and conclude that the Board's order should be affirmed and enforced.

I.

On January 13, 1983, Norfolk and Nance entered into an agreement to settle Nance's various claims against Norfolk for a lump sum payment. They stated the terms of the settlement on a government settlement form, Form LS-471, signed by their respective counsel, and submitted it to the Deputy Commissioner, all as required by 33 U.S.C. § 908(i) and 20 C.F.R.§ 702.241-243. On the same day, the agreement was approved by Deputy Commissioner Basil Voultsides of the Office of Workers' Compen-

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It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this Act. Any employer who violates this section shall be liable to a penalty of not less than $100 or more than $1,000, as may be determined by the deputy commissioner. All such penalties shall be paid to the deputy commissioner for deposit in the special fund as described in section 44, and if not paid may be recovered in a civil action brought in the appropriate United States district court. Any employee so discrimnated against shall be restored to his employment and shall be compensated by this employer for any loss of wages arising out of such discrimination: Provided, That if such employee shall cease to be qualified to perform his duties of employment, he shall not be entitled to such restoration and compensation...

sation Programs. As the ALJ found, the LS-471 did not contain a "provision expressly or impliedly permitting Employer to discharge Claimant after consummation of the settlement." In addition to making no mention that Nance would be discharged or that he would quit his employment, the parties described the type of employment that Nance, despite his injuries, could still perform. Shortly after March 7, 1983, Nance, who had been in lay-off status, received a letter from Norfolk advising him that his job had been terminated and all of his insurance benefits had been cancelled. Before the ALJ, Norfolk proffered evidence that as part of the settlement Nance and it had verbally agreed that Nance's employment would be terminated. Nance's proffered evidence was a denial of the existence of any such agreement. The ALJ ruled that Norfolk's evidence was inadmissible and he refused to receive it.

Noting that Paragraph IV of Form LS-471 provides for "Action of the Deputy Commissioner" in order to make the settlement effective, the ALJ concluded that settlement procedures under the Act clearly contemplated that the complete agreement must be set forth in writing as a prerequisite to approval:

> [T]he text of an LS-471 makes it clear that agreements extrinsic to that document are not to be considered in the approval process. It is apparent from the face of the LS-471 that it is intended to be the complete and integrated statement of the agreement between Claimant and Employer. Nor are there any ambiguities in the document requiring resolution. The LS-471 must, on its face, be considered an integrated agreement incorporating into a single written memorial all prior negotiations. There is accordingly, a conclusive presumption that the LS-471 incorporates the whole contract and is the sole evidence of the agreement. Employer may not, therefore, adduce evidence to show that Claimant had as a part of the settlement agreed to voluntary termination of his employment after the settlement in an attempt to vary the terms of the agreement.

Accordingly, he refused to receive Norfolk's evidence of an oral agreement as part of the settlement to terminate Nance's employment.

The ALJ further found the requisite discriminatory intent for a §49 violation in Norfolk's testimony as to why it sought a voluntary termination agreement. Norfolk employees testified that Norfolk had a practice of settling only those compensation claims in which the employee agreed to leave his or her job. The ALJ decision quoted the following testimony by Norfolk's Director of Safety and Workmen's Compensation:

> All lump sum settlements have worked around the employee voluntarily quitting. The employee is usually unhappy at that point, and we want a clean slate.
>
> * * * * * * * *
>
> [N]ormally, the employee is unhappy. The medical information is becoming conflicting, that there are several doctors involved. You build a hostility situation where no matter what you do everybody is not going to be happy.
>
> ALJ: This is because of the previous dealings on the claim, is that correct?
> Witness: That is correct. So what you arrive at, a lump sum settlement to me means a clean slate for everyone and off you go on with the rest of your life and we close up our books, and that is it.
>
> * * * * * * * *
>
> ALJ: You are talking about a clean slate. If I understand you correctly is that what you are saying is that you felt that in view of the preceding history of this Workers' Compensation claim that there may have been some friction, and as a result you wanted Mr. Nance out of the company for a clean slate, is that correct?
> Witness: That is correct.

On the basis of what he terms "generalized animus against longshore claimants as a class" because of friction engendered in the claim process, and specific testimony that Norfolk wanted a "clean slate" in the case of Nance, the ALJ found that Norfolk discriminated against Nance for filing a compensation claim in violation of 33 U.S.C. § 948a.[3]

Finding sufficient specific evidence of retaliatory intent in the case before him, the ALJ declined to reach the question of whether Norfolk's policy of conditioning settlement on voluntary termination was consistent with § 49. But on appeal, the Board ruled, in addition to affirming the findings and conclusions of the ALJ, that Norfolk's general policy of conditioning settlements upon a termination of employment was a violation of § 49 as a practice running "counter to the beneficent purpose of the Act."

II.

This appeal presents two issues: whether the ALJ correctly excluded the proffered evidence; and whether there was substantial evidence of discriminatory intent against Nance to hold Norfolk in violation of Section § 49, or, in the alternative, whether the Board erred in holding that Norfolk's general policy of conditioning settlement on voluntary termination agreements violated the Act. Because we conclude that the ALJ correctly excluded the proffered evidence of the alleged oral agreement, and because we conclude that there was substantial evidence to support the finding of a violation of § 49 of the Act, we do not address the broader question of whether the Board erred as a matter of law in holding Norfolk's general policy to be a violation of § 49.[4]

III.

In reviewing cases arising under the Act, our standard of

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[3] *See* n. 2, *supra.*

[4] The Board's ruling, in this respect, necessarily encompasses fact patterns, such as a settlement on Form LS-471, which are not present in this case. We think that it is premature in this case to address the issue.

review is limited to the determination of whether the ALJ's findings are supported by substantial evidence in the record considered as a whole. If findings are so supported and are not arbitrary, they may not be disturbed. *Dickens v. Tidewater Stevedoring Corp.*, 656 F.2d 74, 76 (4 Cir. 1981).

The ALJ rejected Norfolk's proffered evidence of an oral agreement partly on the basis of the parole evidence rule. The parole evidence rule is a substantive rule of law, not a rule of evidence, which bars the admission of extrinsic evidence to vary or contradict the terms of a complete and integrated written agreement. While the ALJ referred explicitly to the rule, he also noted that the settlement form itself requires that the Deputy Commissioner approve settlements on the basis of the information disclosed in the form. The Board further noted that the Act both requires such approval and prohibits an employee from waiving rights to compensation except through approved settlements. Section 8(i)(1), 33 U.S.C. § 908(i)(1), provides that the settlement be approved only under certain conditions:

> [T]he deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress.... No liability of an employer ... shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge....

Claimants are not permitted to waive their right to compensation except through settlements approved by the deputy commissioner, *see* 33 U.S.C. § 915, 916. A regulation passed pursuant to the Act, 20 C.F.R. § 702.242(a), expressly provides that the Form LS- 471 must be a "self-sufficient" document, and 20 C.F.R. § 702.242(b)(1) further provides that the settlement agreement include "[a] full description of the terms of the settlement....."[5] Thus this appeal

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[5] Norfolk contends on appeal that the alleged voluntary termination agreement was not a part of the settlement agreement and therefore should not be held to these statutory procedures. We disagree. The provision of 20 C.F.R. § 702.242(a) that such agreements be self-sufficient mandates that the agreement

(Footnote continued on following page)

presents an even stronger case for the exclusion of evidence not disclosed in the settlement form than a case involving a general application of the parole evidence rule in administrative proceedings. The terms of the settlement agreement, in conjunction with the statutes and regulations that govern its effect, prohibit enforcement of any verbal agreement by Nance to leave his job not included in the settlement terms set forth in the LS-471 agreement.[6] The ALJ and Board were therefore not only

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(Footnote continued from preceding page)

be included, at least where, as in this case, the alleged agreement to quit was in partial compensation for monies listed in the Form LS-471. 20 C.F.R. § 702.242(a) provides:

> The settlement application shall be a self-sufficient document which can be evaluated without further reference to the administrative file. The application shall be in the form of a stipulation signed by all parties and shall contain a brief summary of the facts of the nature of the injury to include the degree of impairment and/or disability, a description of the medical care rendered to date of settlement, and a summary of compensation paid and the compensation rate or, where benefits have not been paid, the claimant's average weekly wage.

Furthermore, 20 C.F.R. § 702.242(b) requires that the terms of the settlement be set forth in detail:

> (b) The settlement application shall contain the following:
>
> (1) A full description of the terms of the settlement....
>
> (2) The reason for the settlement, and the issues which are in dispute, if any.
>
> * * * * * *
>
> (4) Information on whether or not the claimant is working or is capable of working....
>
> * * * * * *
>
> (6) A statement explaining how the settlement amount is considered adequate.

[6] The Deputy Commissioner having considered the foregoing Application for Approval of an Agreed Settlement and *the best interests of the employee concerned having been considered, as required by section 8(i) (A) and (B) of the Act, it is determined that payment of compensation and/or medical benefits pursuant to the said agreement would be for the best interests of the employee.* A compensation order will be prepared by the Deputy Commissioner formally approving this agreed settlement and fixing the amount of the attorney fee. Payment is not to be made by the carrier or the employer until this order is filed in the Office of the Deputy Commissioner. (Emphasis supplied)

justified in regarding the settlement form as a complete, unambiguous, and self-sufficient document, but they would have lacked authority to enforce an extrinsic verbal agreement as part of the Act's approval process, even if the ALJ had admitted evidence of such an agreement and found it credible.

Norfolk argues that the § 49 claim discharged in the settlement agreement refers to the instant legal proceedings. But this can not be so, because it would be absurd for the agreement to anticipate and discharge a § 49 claim which had not yet arisen. Moreover, even if such a vague reference to § 49 somehow anticipated the instant litigation, such a reference would not be a sufficient disclosure under the Act and regulations, *see* 29 C.F.R. § 702.242(b)(1) ("a *full* description of the terms") (emphasis supplied), of the settlement to allow the Deputy Commissioner to make an informed review of the parties' Form LS-471.

Norfolk further contends that because the ALJ and Board found that its practice of seeking voluntary termination as a part of any settlement was evidence of discriminatory intent, both administrative decisions are internally inconsistent in ignoring the alleged application of this practice in the case of Nance. While this line of reasoning may appear persuasive at first glance, a closer analysis of the ALJ and Board's position persuades us that their positions are not internally contradictory. The evidence of Norfolk's general practice of seeking voluntary terminations, and its desire to obtain such an agreement in its negotiations with Nance, is highly probative as to whether Norfolk had the requisite discriminatory intent in discharging Nance. However, the finding of discriminatory intent does not, in itself or by logical implication, entail a finding that Norfolk and Nance did, in fact, enter into such a voluntary termination agreement. Whether or not such an agreement was entered into, Norfolk's testimony on its desire to enter into such an agreement in the case of Nance in order to "clean the slate" of friction or hostility associated with his claim is substantial evidence of discriminatory intent.

We therefore conclude that the finding that Norfolk had discriminatory intent and thus violated § 49 is supported by substantial evidence and should not be disturbed.

IV.

Norfolk's further contentions that the Board's decision is contrary to the policy of the Act and unlawfully modifies the settlement agreement are, in light of what is said above, without merit.

AFFIRMED; ENFORCEMENT GRANTED.

MURNAGHAN, Circuit Judge, dissenting:

The Norfolk Shipbuilding & Drydock Corporation (Norfolk Ship) made a slight but significant error, which may or may not be decisive here insofar as the order to reinstate Robert T. Nance with back pay is concerned. It simply failed to cross all the t's and dot all the i's by not complying exactly with the Government's settlement form LS-471. The ALJ, the Benefits Review Board, and most recently the majority have employed various legal and logical gymnastics to convert that failure at contract integration into a breach by Norfolk Ship of the statutory prohibition on employers from discriminating against employees who file Longshore and Harbor Workers' Compensation Act (LHWCA) claims.

I disagree with the conclusion that there was discrimination as set forth in section 49 of the LHWCA, 33 U.S.C. § 948a, by reason of supposed retaliation by discharging Nance from his job after the parties entered into an agreement to settle pending claims for disability compensation, age discrimination, discrimination under section 49 and a grievance to his union. I would, therefore, reverse the decision of the Benefits Review Board.

Norfolk Ship believed, as the ALJ agreed, and even the majority leaves unchallenged (since it does not reach the issue) the finding that Norfolk Ship believed that Norfolk Ship could properly condition settlement of LHWCA claims upon voluntary termination of employment by the employee. It was further found that Norfolk Ship has acted uniformly to require termination in every case where such a belief has come into play. In the circumstances, I fail to perceive discrimination, either as retaliation or in any other form, as a result of attempted implementation of that honestly held belief.

Norfolk Ship has discharged Nance on an erroneous belief that he agreed to resign. Since he had not agreed to resign he might have a right to reinstatement, back pay or other damages. However, such rights do not arise under the LHWCA. The LHWCA only provides for reinstatement and back pay when an employee is discriminated against in retaliation for bringing a LHWCA claim. That did not occur in the present case so reinstatement rights did not accrue under the LHWCA. Rather, an employee was discharged on the erroneous belief that he had agreed to resign. Nance's right to force Norfolk Ship to rectify its error, if it exists, must come from some other source, e.g., a union contract, common or other statutory law. The existence vel non of such other rights is not before the Court.

To reach a conclusion of discrimination as the majority has done seems to disregard the holding in *Ellett v. Giant Food, Inc.*, 66 Md.App. 695, 505 A.2d 888 (1986). The LHWCA operates as the workers' compensation law for the District of Columbia. Ellett filed a claim under the LHWCA that was pending when she was discharged from Giant's employ. Several months following the discharge she and Giant settled the LHWCA claim. In that agreement, Ellett agreed that she had no section 49 claim. She later brought an alleged abusive discharge claim. The Court of Special Appeals of Maryland affirmed the entry of summary judgment on that claim in favor of Giant. The court indicated that, when she agreed that she had no section 49 claim, she agreed that she had not been fired in retaliation for claiming compensation. Her statement was tantamount to a release and the court would not allow her later to repudiate it. *Id.* 66 Md.App. at 701-02, 505 A.2d at 871.

In that case, Giant had fired Ellett, and was not prohibited from, after the fact, negotiating an agreement with her that she had not been fired in retaliation for claiming LHWCA compensation. Logically then, an employer should be able to do the reverse under the LHWCA, namely,negotiate a waiver of section 49, *i.e.*, condition the settlement on a right to discharge, prior to making the settlement.

The Board concluded that the LHWCA prohibits such agreements and that even the attempt by Norfolk to negotiate for

one is retaliatory. The majority did not reach the issue of whether the LHWCA prohibits such agreements, it concluded that the ALJ properly found discriminatory intent under the facts of the case. Because I believe, and will later show, that the ALJ's finding of discriminatory intent under the facts of the present case is irrational, I reach the issue left open by the majority.[1] Not only was the Board's decision that the LHWCA prohibits the employer from negotiating for and accepting an employee's resignation as a term of a settlement of LHWCA claims without citation, but the only reason it gave for its decision was its belief that the beneficent purpose of the LHWCA required its results. That conclusion is at odds with the general federal policy in favor of settlements, at odds with analogous authority and at odds with the LHWCA.

Those cases considering an analogous issue — whether an employee can waive his or her remedial rights in settlement of an employment discrimination claim find that employees can waive. The cases are analogous to the LHWCA because an agreement to waive remedial rights like reinstatement and back pay under equal employment opportunity laws is equivalent to an agreement to waive a section 49 claim or an agreement to resign. All mean that the claimant will not invoke a right to challenge a dismissal. Courts construing Title VII and the like have not adopted a flat prohibition on the waiver of remedial rights as the Board did in the present case. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n. 15, 94 S.Ct. 1011, 1021-22 n. 15, 39 L.Ed.2d 147 (1974) (presuming that employee can waive a cause of action under Title VII as a part of a voluntary settlement); *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339 (11th Cir. 1983); *Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207 (5th Cir. 1981) (holding that an oral agreement to settle a Title VII claim is enforceable).

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[1] It is irrational and arbitrary to conclude that Norfolk Ship discriminated against Nance while simultaneously concluding that it acted pursuant to what it believed was its contractural right. In order for such conduct to be "discriminatory" for section 49 purposes, the acquisition itself of the contractural right and hence the belief of its existence must be forbidden. The Board recognized that logical necessity and found that the acquisition of the right is forbidden. I recognize that logical necessity *vel non* must be pursued and reach the issue but agree with the Board's interpretation of the LHWCA.

(Footnote continued on following page)

Additionally, to the extent that there is a difference between settlement of employment discrimination claims and LHWCA claims, that difference militates in favor of more generous court recognition of LHWCA settlements. Under the LHWCA, settlements are void unless approved by the deputy commissioner or the ALJ. 33 U.S.C. §§ 915, 908(2)[2]. Therefore, it is less likely that employers will overreach with LHWCA settlements since neutral third party approval of them is first required. Further, section 8 of the LHWCA, 33 U.S.C. § 908, in providing for settlement approval does not differentiate among the LHWCA claims that can be settled. There is no suggestion that while other LHWCA claims can be settled, a section 49 claim cannot be settled.

Although the Board's approval of the ALJ's decision is not supported by the proffered justification, I would, nevertheless, consider any other possible reasons to support the ALJ's decision. The ALJ offered another. He found that while a section 49 waiver or an agreement to resign might not flatly be prohibited, there was no such agreement in the present case, and that Norfolk Ship's termination of Nance was retaliatory since done pursuant to a Norfolk Ship standard policy of terminating all lump sum settlement recipients. That justification is the one upon which the majority basis its affirmance.

While I agree with the first part of the conclusion of the ALJ, that there was no enforceable agreement of Nance to resign, I cannot agree with the second. The ALJ found as a fact that Norfolk

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The majority suggests that the logical quagmire that I posit while persuasive at first glance disaapears on furthur reflection. For me it does not disappear. The import of the majority's reflection is somewhat lost on me, but it suggests that the inconsistency can be removed if one considers that Norfolk Ship and Nance may *not* have agreed for Nance would resign. *See, supra,* at 187. Whether Norfolk Ship and Nance agreed for Nance to resign is not relevant to this claim of discrimination. As majority has persuasively pointed out, because such an agreement was not made part of the Form LS-471, Norfolk Ship and Nance did not *enforceably* agree for Nance to resign.

The majority suggests that whether they actually agreed for Nance to resign and made a mistake in integration or whether they never agreed is important to resolution of whether Norfolk Ship discriminated against Nance. It is not. What is critical in the present case alleging discrimination is Norfolk Ship's intent.

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Ship acted on a sincere belief, later proved erroneous, "that a voluntary quit by Mr. Nance was included in the settlement." 19 Ben.Rev.Bd.Serv. (MB) 115 (ALJ), 124 (ALJ) (Aug. 4, 1986). Yet he nonetheless found discrimination, a section 49 violation, by virtue of Norfolk Ship's uniform practice of asking a claimant to give up his or her right to employment in order to settle a LHWCA compensation claim. That finding is arbitrary and should be set aside. *Dickens v. Tidewater Stevedoring Corp.*, 656 F.2d 74, 76 (4th Cir. 1981).

On the one hand the ALJ assumed that Norfolk Ship could, upon an honest belief that it was entitled to do so, ask for, negotiate and accept a waiver of an employee's right to employment as part of a settlement. If found that Norfolk Ship thought that it had, in the present case, done so. Yet when Norfolk Ship attempted to act pursuant to that belief, though implementation was flawed, the ALJ found the action impermissibly retaliatory. That elevates form over substance and irrationally whipsaws Norfolk Ship. Under the ALJ's resolution, Norfolk Ship's behavior would have been proper, the resignation provision enforceable and the section 49 claim barred had the resignation provision been properly written into the settlement agreement. The ALJ's resolution allows the mere failure of integration into the written document to give rise to a retaliation claim, while admitting that including such a provision would have been in order. The failure to put a term requiring termination of employment into the agreement means that Norfolk Ship cannot enforce that term because it is not part of the agreement. Thus, Norfolk Ship had no right to terminate Nance on the basis of the settlement agreement. Since Norfolk Ship did not have that right

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Holliman v. Newport News Shipbuilding and Dry Dock Co., 852 F.2d 759 (4th Cir. 1988). The ALJ found that Norfolk Ship believed that Nance had agreed to resign. That is the critical inquiry, and it was resolved by the ALJ.

If Norfolk Ship believes that Nance agreed to resign it does not discriminate against him when it terminates him *unless* its acquisition of the right (and belief) that Nance agreed to resign is itself discriminatory under the LHWCA. That issue must be reached to decide the case.

[2] *See supra* at 185-186 where the majority opinion discusses procedures incident to settlement approval.

it may have to rehire him. However, such a right to reinstatement would come, not under the LHWCA, but under an employment agreement like a union contract or perhaps under a common law or other statutory right. If Nance has such a right he can enforce it under its terms. I offer no opinion on the existence or enforceability of such a right since the issue was not presented to this Court.

In the present case, Nance attempts to enforce a right to continued employment of another sort, the right to continued employment after making a LHWCA claim. That right is breached if the employer fires a claimant because he filed a claim. But that is not this case. Norfolk Ship fired Nance because it thought that he had agreed to be terminated. It was an incorrect reason but it was not an impermissible one.

A section 49 claim necessarily looks to the intent of the employer. The employer must have a retaliatory intent. *Holliman,* at 760-761 *(citing Geddes v. Benefits Review Board,* 735 F.2d 1412 (D.C. Cir. 1984)). Here, the ALJ found that Norfolk Ship believed that it had a contractual right to terminate Nance. That is conclusive proof of lack of retaliatory intent, of intent to discriminate.

The ALJ (and the majority in its affirmance) instead, in a twist of logic, somehow inferred that the policy of asking for, negotiating and accepting such waivers to continued employment was tantamount to a discriminatory intent. That inference might be appropriate in a case in which there is little or no direct evidence regarding the employer's intent, but that is not the case at bar. The ALJ concluded that Norfolk Ship terminated Nance because it thought it had a contractual right to do so. To infer in the face of that finding that the termination was in retaliation for claiming compensation under the LHWCA is irrational and arbitrary and should be set aside.

I would reverse the Board and, therefore, dissent.

UNITED STATES DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

BRB No. 86-2436

Robert T. Nance

Claimant-Respondent

v.

Norfolk Shipbuilding & Dry Dock Corporation

Self-Insured
Employer-Petitioner

Director, Office of Workers'
Compensation Programs, United States Department of Labor

Party-in-Interest

Decided on November 23, 1987

PER CURIAM:

Employer appeals the Decision and Order (80-LHC-357 and 82-LHC-74) of Administrative Law Judge Theodor P. Von Brand awarding benefits pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The Board heard oral argument in this case on September 10, 1987, in Norfolk, Virginia.

Facts and Procedural History

Claimant worked as an electrician for employer at various times from 1947 until March 1982, when he was laid off. In January

1983, claimant and employer entered into an agreement to settle several disability claims which had been filed pursuant to the Act, as well as a discrimination claim made pursuant to Section 49 of the Act, 33 U.S.C. §948a, an Equal Employment Opportunity claim, and a union grievance which had all been filed in response to the March 1982 layoff. The settlement application provided that claimant would receive a lump-sum payment of $25,000, plus attorney's fees and costs, in exchange for withdrawing "all...claims pending against [employer]." The settlement was approved by Deputy Commissioner Basil Voultsides, pursuant to 33 U.S.C. §908(i)(A) (1972) (amended in 1984), on January 13, 1983. Claimant received his $25,000 lump-sum payment in February 1983.

In March 1983, claimant received a letter indicating that his employer-sponsored health-insurance coverage had been terminated as of March 1, 1983. Claimant construed this letter as notice that his job with employer had been terminated. He did not receive any other communication from employer regarding his employment status, and he did not return to his former job.

Claimant subsequently challenged the termination of his employment by filing a claim pursuant to Section 49 of the Act, 33 U.S.C. §948a. Employer, maintaining that claimant had agreed to relinquish his job as part of the January 1983 settlement, attempted to introduce hearing testimony allegedly demonstrating that claimant had orally consented to "voluntarily quit" his job as a condition of the settlement.[1] In a pre-hearing ruling, the administrative law judge declined to allow submission of this evidence, based on his determination that the parties' settlement application constituted an "integrated agreement incorporating into a single written memorial all prior negotiations." and that admission of the testimony which employer sought to introduce was thus precluded by the parol evidence rule. The administrative law judge nonetheless stated that he would allow employer's officials to testify as to the nature of the parties' settlement negotiations, as such testimony would address claimant's termination and thus would be relevant to the disposition of

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[1] The settlement application itself does not address the matter of whether claimant's employment status would be affected by the parties' agreement.

claimant's Section 49 claim. After a formal hearing was held, the administrative law judge issued his Decision and Order, in which he again denied admission of the evidence he had excluded in his pre-hearing ruling. In addition, the administrative law judge determined that employer's termination of claimant's job constituted a violation of Section 49 of the Act, and ordered employer to reinstate claimant in his former position, pay him appropriate back wages, and tender a $1,000 penalty to the deputy commissioner for deposit in the Special Fund. *See* 33 U.S.C.§§944, 948a. Employer's subsequent motion for reconsideration of the Decision and Order was denied.

On appeal, employer challenges the administrative law judge's finding that employer, in terminating claimant's job, possessed the discriminatory intent requisite to establishing a Section 49 violation. Employer additionally assigns error to the administrative law judge's refusal to allow submission of the evidence excluded in his pre-hearing ruling, and his resultant determination that claimant did not orally agree to relinquish his job as a condition of the parties' 1983 settlement. Claimant and the Director, Office of Workers' Compensation Programs, respond that the finding of a Section 49 violation should be upheld.[2] The Board must affirm the administrative law judge's Decision and Order if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Discussion

The dispositive issue presented by this appeal is whether the administrative law judge properly determined that claimant's job was terminated in retaliation for having pursued and obtained a lump-sum settlement of his work-related clams, in violation of Section 49 of the Act.

Section 49 provides, in pertinent part, that:

> It shall be unlawful for any employer...to discharge or in any other manner discriminate

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[2] By letter dated August 23, 1987, the Director filed his statement of position in this case. Employer responded on September 2, 1987. These documents are accepted into the record.

> against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer.... Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: Provided, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation.

33 U.S.C. §948a. To prevail on a claim filed pursuant to Section 49, the claimant must prove that a discriminatory act, motivated by discriminatory animus, has been committed by the employer. *Geddes v. Benefits Review Board,* 735 F.2d 1412, 16 BRBS 88 (CRT) (D.C. Cir. 1984). Once these threshold elements have been established, the employer may defeat the claim by demonstrating that its action was not motivated, even in part, by the claimant's exercise of his rights under the Act. *Tibbs v. Washington Metropolitan Area Transit Authority,* 17 BRBS 92 (1985), *aff'd,* No. 85-1222 (D.C. Cir., February 14, 1986) (unpublished).

In finding that employer violated Section 49, the administrative law judge viewed claimant's termination as a "discriminatory act," and employer's concededly standard practice of seeking voluntary-quit agreements from employees obtaining settlements as indicating the retaliatory intent necessary to Section 49. On appeal, employer contends that since it believed, at the time of claimant's termination, that claimant had consented to this action (i.e., that he had "voluntarily quit"), the discriminatory intent requisite to establishing a Section 49 violation never existed in the instant situation.

We reject this argument. Both of employer's officials who testified at the hearing repeatedly indicated that employer routinely seeks to procure employee's agreements to quit voluntarily when entering into settlements of their work-related claims. One of these officials even stated that the reason employer attempts to obtain such agreements from these individuals is that employees who have pursued and sought settlements of their disability claims are

generally regarded with disfavor. This evidence supports the administrative law judge's finding that employer's practice of inducing its injured employees to relinquish their jobs in exchange for lump-sum settlements of their claims "demonstrates generalized animus against longshore claimants as a class."

The Act provides a compensation scheme for injured workers, with benefits payable as provided in Section 8, 33 U.S.C. §908(i). *See* 33 U.S.C. §§915, 916. In this case, claimant settled his claim under Section 8(i). The agreement is specific as to its terms, and it makes no mention of an agreement by claimant to "voluntarily" quit. The deputy commissioner's approval of the settlement also makes no mention of an agreement to quit. The administrative law judge correctly found the evidence sufficient to establish that employer terminated claimant as a result of claimant's compensation claim and its settlement. This conclusion necessarily results from the evidence, since it is employer's admitted policy to retain no employee who enters into a settlement of his compensation claim. Employer's termination of claimant based on this record is clearly a violation of Section 49.

Employer, however, asserts that Section 49 was not violated because claimant agreed to quit as part of the settlement.[3] Even if employer did believe that claimant had consented to have his job terminated, whereupon employer removed claimant from its employ for only that reason, this consideration supports a finding that claimant's termination was related to his compensation claim and thus violated Section 49. The fact that any such consent would have been solicited and obtained only by virtue of claimant's having sought redress under the Act demonstrates that claimant's termination — whether of a voluntary or involuntary nature —

---

[3] The demonstrated relationship between claimant's excercise of his rights under the Act and his termination would be strengthened, rather than undermined, by evidence suggesting that claimant voluntarity relinquished his job as a condition of the 1983 settlement. The evidence proffered by employer below and excluded by the administrative law judge, which allegedly establishes that claimant agreed to have his job terminated would thus fail to preclude a finding that Section 49 was violated in this case. Any error committed by the administrative law judge in ruling that this evidence is not admissible was thus at most, harmless. We accordingly need not address employer's challenge to this ruling.

was related, at least in part, to his having "claimed or attempted to claim compensation from ....employer," 33 U.S.C. §948a, and was thus prohibited under the Act. Under employer's admitted policy, in order to settle a compensation claim, claimant must give up his right to employment. Condoning such a policy, which we view as unconscionable, would clearly run counter to the beneficent purpose of the Act. While employer may not have intended that its policy violate Section 49, it does so nonetheless. We therefore affirm the administrative law judge's finding that employer's termination of claimant's job constituted a Section 49 violation.

The Decision and Order is accordingly affirmed.

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

CASE NOS.: 80-LHC-357
82-LHC-74

OWCP NOS.: 5-11266
5-32801

Robert T. Nance,

Claimant

v.

Norfolk Shipbuilding & Drydock Corporation,

Employer

Decided on April 4, 1986

DECISION AND ORDER

This proceeding involves a claim for disability compensation filed by Robert T. Nance pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Section 901 et seq.

A formal hearing was held in Hampton, Virginia on January 31, 1986, at which all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments

of the parties, applicable statutory provisions, regulations and pertinent precedent.[1]

FINDINGS OF FACT

I. *Identity and Background of the Claimant*

1. Robert T. Nance (the Claimant) resides at 1301 Stubin Street, Chesapeake, Virginia 23324. (Tr. 7).

2. Mr. Nance was employed by the Norfolk Shipbuilding and Drydock Corporation (Shipyard, Norshipco, or Employer) in the years 1947 through 1982, a period which included some intervals of unemployment. Claimant in the relevant period was employed as a first class electrician by Norshipco. (Tr. 7).

3. Claimant, who had brought several compensation claims against Norshipco, was laid off by the Shipyard on March 29, 1982. (Tr. 8; CX 1). Mr. Nance did not return to work at Norshipco and settled his compensation claim with Employer in January 1983. (Tr. 10; Findings 11-12 infra). At the time of layoff he was earning $9.03 per hour. (Tr. 25).

4. The injuries which were the subject of the January 1983 settlement were the following:

April 11, 1975 injury to knee
April 28, 1980 twisting of right leg
October 22, 1980 fall on right knee
April 3, 1981 back injury

As a result of such injuries Claimant had an arthroscopy of the right knee on November 1, 1977 and an exploration of the right patella on December 9, 1980. (EX 8).

5. The Shipyard paid Mr. Nance workers' compensation benefits in the period November 1980 through December 7, 1980. (Tr. 51).

---

[1] The following citations to the record are used herein:
CX - Claimant's Exhibit
EX - Employer's Exhibit
Tr. - Transcript of the Hearing

Findings refer to the numbered findings in this decision.

6. In the agreed statement of facts which is part of the settlement agreement, the parties agreed that the following restrictions are applicable, "No climbing vertical ladders - prolonged squatting or kneeling on the right knee." The parties further agreed that Claimant can best perform work of the following nature:

> Any work which does not require climbing vertical ladders - claimant is an experienced electrician and can perform work in that trade.
>
> (EX 8)

7. While employed by Norshipco, Claimant had a good work record as far as absenteeism, tardiness and accepting overtime work were concerned. No disciplinary actions had been taken against Claimant. (Tr. 14-15).

8. W. B. Mask, Claimant's foreman when he gave Mr. Nance the layoff slip on March 29, 1982 stated that Claimant was getting old, that he worked too slowly and that the had restrictions. (Tr. 18-19).

9. While employed by Norshipco, Mr. Nance was for a period of time shop steward for the Boilermaker's International Union and a member of the Safety Committee. Among Mr. Nance's responsibilities in that position was the reporting of safety violations. (Tr. 19-20).

10. Prior to the settlement with Norshipco in 1983, Mr. Nance, in addition to his Longshore claims, had filed an age discrimination complaint with the Equal Employment Opportunity Commissioner (EEOC) and a union grievance in connection with his layoff in March of 1982. (Tr. 14). The EEOC complaint and union grievance were pending at the time of Claimant's settlement negotiations with the Shipyard.

11. On January 13, 1983 Claimant and Norshipco executed an Application for Approval of Agreed Settlement Section 8(i)" providing in pertinent part as follows:

> The above-named parties make the following statements of fact, and pursuant to the provisions of 33 U.S.C., 908(i) of the Longshoremen's and Harbor Workers' Compensation Act, agree upon the following proposed settlement of the employer's liability to the employee for the payment of compensation.

I. DISPUTED ISSUES(S)

Temporary total disability; permanent total disability; permanent partial disability; violation of § 49.

* * * *

III. AGREED SETTLEMENT

Section III of the "Agreed Settlement" provided as follows:

11. a.	Amount of proposed settlement 8(i)(A)	$25,000.00
b.	Amount of proposed settlement 8(i)(B)	—
c.	Attorney Fee (Application attached) ...	2,000.00 plus costs of $347.50

12. Other: Claimant has agreed as a condition of this settlement to withdraw all other claims pending against Norshipco in other forums, including an age discrimination claim which is pending before the Equal Employment Opportunity Commission (EEOC) and a grievance filed pursuant to the collective bargaining agreement. It is understood that no compensation order will be entered until such time as these other claims are withdrawn. In the event the EEOC does not permit withdrawal of the age discrimination claim, this settlement is null and void and no compensation order will be entered.

12. The Deputy Commissioner approved the parties' settlement agreement on the same date viz. January 13, 1983 as follows:

IV. *ACTION OF THE DEPUTY COMMISSIONER*

The Deputy Commissioner having considered the foregoing Application for Approval of an Agreed Settlement and the best interests of the employee

> concerned having been considered, as required by section 8(i)(A) and (B) of the Act, it is determined that payment of compensation and/or medical benefits pursuant to the said agreement would be for the best interests of the employee. A compensation order will be prepared by the Deputy Commissioner formally approving this agreed settlement and fixing the amount of the attorney fee. Payment is not to be made by the carrier or the employer until this order is filed in the Office of the Deputy Commissioner.

13. On March 7, 1983, Mr. Nance received a letter from Norshipco's insurance department advising that his health and life insurance had been terminated effective March 1, 1983. This was Claimant's first notification that he had been terminated by Employer. Mr. Nance in fact never received a formal separation notice from the Shipyard. (Tr. 11-12; CX 2).

14. Mr. Nance denies agreeing to voluntarily quit his job with Norshipco either verbally or in writing. (Tr. 25-26).

15. The settlement agreement contains no provision expressly or impliedly permitting Employer to discharge Claimant after consummation of the settlement (Finding 35 infra, EX 8).

16. As a result of his termination in March of 1983, Mr. Nance lost his health benefits, life insurance, vacation benefits, pension and paid holidays. Since going back to work at Norshipco in 1974, Mr. Nance had accumulated eight years of service to retirement. At the time of settlement, Claimant was in financial difficulty. (Tr. 23).

17. Mr. Nance, at the time of hearing, had a temporary job with the Norfolk Naval Shipyard which began in June 1985. Claimant is able to perform the duties of an electrician first class with Norshipco. He would like to return to Norshipco if his benefits were reinstated. (Tr. 26, 37-39).

18. In 1983, Mr. Nance earned no money other than that received for unemployment compensation and the $25,000.00 settlement award. In January 1984, Claimant began working for his son at $5.50 an hour as a truck driver. Mr. Nance continued working for his son until be began working to the Norfolk Naval Shipyard in June 1985. Except in cases of bad weather, Mr. Nance

generally worked 40 hours weekly while employed by his son. (Tr. 36-39). In the period 1983 through 1984, he made approximately $15,000 to $16,000 while working for his son. (Tr. 40-41).

19. At the Norfolk Naval Shipyard Claimant's starting wage was $9.40 an hour; at the time of hearing he was earning $9.81 an hour. (Tr. 44).

II. *Employer's Policy on Lump Sum Settlements, the Settlement of Mr. Nance's Claim and His Termination.*

20. Winston Smith is Director of Safety and Workmen's Compensation at Norshipco, a position he has held for nine years. (Tr. 50).

21. Mr. Smith and John B. King Norshipco's outside attorney, who is deceased, were involved in the settlement discussions leading up to the agreement of January 13, 1983. (Tr.57; Findings 31-32 infra).

22. In the course of those settlement discussions Mr. Smith discussed the amount of a possible lump sum settlement and Claimant's departure from Norshipco with Mr. Nance's attorney. (Tr. 57).

23. It is Norshipco's policy to secure an agreement by the employee to voluntarily quit in return for a lump sum settlement. Ninety-nine percent of Norshipco's lump sum settlements under the Longshore Act have in fact culminated in a voluntary quit. (Tr. 58).

24. Mr. Smith explained the reasons for this policy as follows:

> *All lump sum settlements have worked around the employee voluntarily quitting. The employee is usually unhappy at that point, and we want a clean slate.* The employee goes to work somewhere else. We arrive at a mutual agreement. We pay up, and that is it, and I close the case and get it off my books. (Emphasis supplied).
>
> (Tr. 58)

25. Linking an agreement for a voluntary quit as a *quid pro quo* for a lump sum settlement is "standard procedure" for

Norshipco. (Tr. 72-73).

26. When Mr. Smith determined that Claimant was not entitled to retirement, he raised the ante to $25,000. He explained:

> So at that point with several minutes of discussion, I threw it out that $25,000 was it. You know, he was not eligible [for retirement], *so throw the other $5000 in, but that was going to be it, and that he was going to go.* And the last sentence where I talk about going to management with it, you know, going to management not to get authority to approve it. I had authority to do it. It was strictly to let management know that we had reached an agreement or did not reach an agreement. (Emphasis supplied).
>
> (Tr. 60-61)

27. Mr. Smith felt that in the case of Mr. Nance because of the preceding history of this worker's compensation claim there may have been some friction and therefore he wanted Mr. Nance out of the company for a clean slate. (Tr. 77-78)[2].

28. Mr. Smith explained the reasons for this procedure as follows:

> Q. Why do you include that as part of the settlement?
>
> A. Because normally, the employee is unhappy. The medical information is becoming conflicting, that there are several doctors involved. You build a hostility situation where no matter what you do everybody is not going to be happy.

---

[2] JUDGE VON BRAND: Let me ask you this at this point. You are talking about a clean slate. If I understand you correctly is that what you are saying is that you felt that in view of the preceding history of this workers' compensation claim that there may have been some friction, and as a result you wanted Mr. Nance out of the company for a clean slate, is that correct?

THE WITNESS: That is correct.

JUDGE VON BRAND: This is because of the previous dealings on the claim, is that correct?

THE WITNESS: That is correct. So what you arrive at, a lump sum settlement to me means a clean slate for everyone, and off you go on with the rest of your life, and we close up our books, and that is it.

(Tr. 74)

29. In addition to the friction arising out of the workers' compensation claims, Mr. Smith desired to get rid of Claimant because he considered him to be a chronic complainer. In this connection he stated:

BY MR. BILISOLY:

Q. So to put it all on the table, one of the reasons to settle the case was to get rid of Mr. Nance, was it not?

A. Yes.

(Tr. 80-81)

30. Mr. Smith denied that he requested the personnel department to change Mr. Nance's records to a voluntary quit because he had filed a compensation claim. (Tr. 83).

31. A handwritten note by Mr. Smith of a conversation with John King on November 7, 1982 states:

Jack King states that he thinks Nance would take $20,000 and a VQ [voluntary quit] if he is eligible for company retirement.

(EX 1)

In fact Mr. Nance was not eligible for retirement since he had been employed continuously for only eight years. (Tr. 59-60).

32. On November 18, 1982, Mr. Smith made another handwritten notation of a conversation with Mr. King stating in

pertinent part "Nance will take $25,000 VQ" and "Payment of Dr. K ends all injury claims plus EEOC charges plus arbitration." (EX 3; Tr. 63). At that point, Mr. Smith had agreed to an attorney's fee of $2,000.00 to Claimant's counsel. (EX 3; Tr. 65).

33. Mr. Smith felt he had a legal opinion from Mr. King that the reference to Section 49 under disputed issues in the settlement agreement was equivalent to an agreement on Claimant's part to accept a voluntary quit. (Tr. 75-76, 89, 93, 97).

34. Mr. Smith's belief that the settlement agreement included a voluntary quit by Claimant was based on his months of conversation about the settlement, the execution of the agreement, and discussion with his attorneys indicating that it was covered. (Tr. 92). Based on that understanding Mr. Smith advised his supervisor, James T. Wermeister, Norshipco's Director of Industrial Relations to remove Mr. Nance from the rolls as a voluntary quit. (Tr. 92, 98). Mr. Wermeister also understood the settlement to include a voluntary quit on the part of Claimant. (Tr. 105-106, 120).

35. Norshipco before implementing the termination of Mr. Nance had no written documentation indicating that Claimant had agreed to a voluntary quit. (Tr. 123).

DISCUSSION

Robert T. Nance, Sr. (the Claimant) sustained four injuries in the period April 11, 1975 through April 3, 1981. Norfolk Shipbuilding and Drydock Corporation (Norshipco) contested its liability with respect to certain of the injuries. In addition, claimant had filed an age discrimination claim with the Equal Employment Opportunity Commission, a Section 49 claim under the Longshoremen's and Harbor Workers' Compensation Act and a grievance under a union collective bargaining agreement. The EEOC claim, the Section 49 claim and the grievance related to Claimant's layoff on March 27, 1982. Mr. Nance has not returned to work at Norshipco since that date.

On January 13, 1983, Claimant and Norshipco signed an "Application for Approval of Agreed Settlement - Section 8(i)(a)." Among the disputed issues were "[t]emporary total disability; permanent total disability; permanent partial disability; violation of §49."

Section III of the "Agreed Settlement" provides as follows:

11. a.	Amount of proposed settlement 8(i)(A)	$25,000.00
b.	Amount of proposed settlement 8(i)(B)	—
c.	Attorney Fee (Application attached) ...	2,000.00 plus costs of $347.50

12. Other: Claimant has agreed as a condition of this settlement to withdraw all other claims pending against Norshipco in other forums, including an age discrimination claim which is pending before the Equal Employment Opportunity Commission (EEOC) and a grievance filed pursuant to the collective bargaining agreement. It is understood that no compensation order will be entered until such time as these other claims are withdrawn. In the event the EEOC does not permit withdrawal of the age discrimination claim, this settlement is null and void and no compensation order will be entered.

The Deputy Commissioner on January 13, 1983 approved the agreement as in the best interests of Mr. Nance pursuant to the provisions of Section 8(i)(A) and (b) of the Act. (Findings 11- 12).

Once the EEOC charge and the grievance had been withdrawn, Norshipco implemented the settlement agreement by paying the agreed upon lump sum settlement and attorney fees. In addition, Norshipco dropped Mr. Nance from its employment rolls effective March 1, 1983 on the ground that the settlement included an undertaking on his part to voluntarily quit.

Mr. Nance, on the basis of his termination effective March 1, 1983, has filed the Section 49 claim in issue in this proceeding. Employer asserts the claim is barred by an alleged agreement as part of the settlement to voluntarily quit. Mr. Nance denies such an agreement. There is no written documentation of an agreement by Claimant to voluntarily quit in return for the $25,000.00 settlement. To demonstrate such an agreement, Employer would have to resort to evidence extrinsic to the written settlement agreement executed by the parties on January 13, 1983 and approved by the Deputy Commissioner on the same date.

The Parol Evidence Rule

The settlement agreement Form LS-471, as already noted, contains no provision expressly or impliedly permitting Employer to discharge Claimant after consummation of the settlement. Employer seeks to introduce evidence extrinsic to the written agreement to prove such an undertaking by Mr. Nance. This decision incorporates and reaffirms the prior pretrial ruling excluding such evidence:

> Employer urges that the LS-471 does not constitute the entire agreement of the parties and that it should be permitted to adduce evidence to show that Mr. Nance agreed to his post settlement discharge on a voluntary quit basis as a part of the settlement agreement. Claimant urges that such evidence is barred by the Parol Evidence Rule. The "rule requires, in the absence of fraud, duress, mutual mistake, or something of the kind, the exclusion of extrinsic evidence, oral or written, where the parties have reduced their agreement to an integrated writing." 4 Williston on Contracts § 631.
>
> Paragraph IV of the LS-471, "Action of the Deputy Commissioner," clearly contemplates that the complete agreement of the parties be reviewed as a prerequisite to approval. Absent such information, the Deputy Commissioner could not intelligently review the settlement with the "best interests" of the Claimant in mind.[3] Approval, moreover, according to Paragraph IV, is to be given on the basis of the "foregoing application." In short, the text of an LS-471 makes it clear that agreements extrinsic to that document are not to be considered in the approval process. It is apparent from the face of the LS-471 that it is intended to be the

---

[3] An agreement where a claimant agrees to give up his job as a *quo quid pro* for a lump sum settlement, ~~is~~ precisely the type of condition which must be reviewed in evaluating whether the agreement is in his best interests. The LS-471, on its face, requires that all parts of the settlement relevant to the best interests question be included in that document.

> complete and integrated statement of the agreement between Claimant and Employer. Nor are there any ambiguities in the document requiring resolution. The LS-471 must, on its face, be considered an integrated agreement incorporating into a single written memorial all prior negotiations. There is accordingly, a conclusive presumption that the LS-471 incorporates the whole contract and is the sole evidence of the agreement. Employer may not, therefore, adduce evidence to show that Claimant had as part of the settlement agreed to voluntary termination of his employment after the settlement in an attempt to vary the terms of the agreement. Employer's contention that the settlement bars this proceeding is rejected. (Order Designating Issues to be Tried in This Proceeding and Setting Hearing Date, October 29, 1985)

An employer's motivation in discharging an employee is, however, crucial to any Section 49 proceeding. The Parol Evidence rule although it precludes an attempt to vary the agreement by extrinsic evidence does not prohibit evidence bearing on the question of retaliatory intent. Accordingly, Employer's officials were permitted to testify concerning their understanding of the settlement agreement and the effect, if any, of such understanding, on the decision to discharge the Claimant.

Employer's Intent in Terminating Claimant

Prerequisite to prosecution of a Section 49 claim are proof of a discriminatory act by employer and proof that the discrimination was motivated by animus against the employee because of the filing of a claim under the Act. The second requirement is satisfied even if the employer's action is only partially motivated by the employee's exercise of his rights under the statute. Put another way, "an employer who discriminates against an employee both because the employee filed a compensation claim and because of other, independent reasons nonetheless violates section 49." *Geddes v. Benefits Review Board,* 16 BRBS 88 CRT, 90 CRT (D.C. Cir. 1984). The starting point in deciding this issue is the principle that Employer's intent may be inferred from the facts and

circumstances surrounding the discharge. *Curling v. Newport News Shipbuilding and Dry Dock Company,* 8 BRBS 770, 772 (1978).

Employer urges that Norshipco's responsible officials terminated Mr. Nance because they believed a voluntary quit was part of the settlement agreement. The record does demonstrate that Messrs. Smith and Wermeister based on oral communications with Claimant's counsel and their own outside counsel believed that a voluntary quit by Mr. Nance was included in the settlement. Particular reliance was placed on verbal communications with their own counsel, Mr. King. That, however, does not end the matter. The crucial consideration is the reasons for Norshipco's insistence on securing the voluntary quit as a part of the settlement agreement. The record on this point is revealing.

It is the Shipyard's policy, as a matter of standard procedure to secure an employee's voluntary quit as part of a lump sum settlement agreement. The reason is that, in Norshipco's view, the employee at that point is generally unhappy because of friction arising out of the claim process and Employer's desire for a clean slate. (Findings 24-25, 28). As Mr. Smith explained:

> Q. Why do you include that as part of the settlement?
>
> A. Because normally, the employee is unhappy. The medical information is becoming conflicting, that there are several doctors involved. You build a hostility situation where no matter what you do everybody is not going to be happy.
>
> JUDGE VON BRAND: This is because of the previous dealings on the claim, is that correct?
>
> THE WITNESS: That is correct. So what you arrive at, a lump sum settlement to me means a clean slate for everyone, and off you go on with the rest of your life, and we close up our books, and that is it.

Employer's standard policy of terminating employees as part of the lump sum settlement procedures because of friction or

hostility engendered by the claim process demonstrates generalized animus against longshore claimants as a class. Moreover, the record shows that in this case Employer specifically intended to seek a voluntary quit by Mr. Nance because of friction arising from the pursuit of his claim. As a result, Norshipco wanted him off the rolls for a clean slate. On this point the record shows:

> JUDGE VON BRAND: Let me ask you this at this point. You are talking about a clean slate. If I understand you correctly is that what you are saying is that you felt that in view of the preceding history of this Workers' Compensation claim that there may have been some friction, and as a result you wanted Mr. Nance out of the company for a clean slate, is that correct?
>
> THE WITNESS: That is correct.
>
> (Finding 27)

The record, accordingly compels the finding that Norshipco's processing of Claimant's voluntary quit was a discriminatory act engendered by his workers' compensation claim. The admission that Employer desired to get rid of Mr. Nance because of past friction arising from his compensation claim and the desire for a clean slate documents the retaliatory intent prerequisite to finding of a violation of Section 49. The fact that Employer may also have desired to terminate Mr. Nance for additional reasons such as chronic complaining does not vitiate the finding of violation. *Geddes v. Benefits Review Board, supra.*

There is an aura of unfairness surrounding a policy requiring financially distressed employees, as a part of the settlement process, to choose between disability compensation and their jobs. The consequences can be grave when that choice in addition to loss of employment also involves deprivation of retirement and health benefits. The record in this case, however, clearly demonstrates the discrimination and retaliatory intent prerequisite to a Section 49 violation. There is accordingly no need in this case to reach the more general question of whether a policy of conditioning settlement on voluntary termination can be reconciled

with the legislative intent underlying the Act.

Claimant is to be reinstated with back pay effective March 1, 1983, the effective date of his termination. Claimant has offered no proposed findings on the issue of back pay. Employer's factual contentions on this issue appear supported by the record. (Findings 3, 17, 18-19). Accordingly, back pay of $11,276.63 is awarded.[4]

Section 49 further provides that "[a]ny employer who violates this section shall be liable to a penalty of not less than $1,000.00 or more than $5,000.00, as may be determined by the deputy commissioner." Norshipco will be required to pay a penalty of $1,000.00 to the Deputy Commissioner in accordance with the foregoing provision of Section 49. See *Curling v. Newport News Shipbuilding and Dry Dock Company,* 8 BRBS 770, 773 (1978).

Attorney Fee

No application for an attorney's fee has been received from Claimant's counsel; consequently, none is awarded at this time. Thirty days is hereby allowed for the submission of such an application meeting the requirements of 20 C.F.R Sections 725.365 and 366. A service sheet showing that service has been made upon all parties including Claimant must accompany the application. The parties have 10 days following receipt of the application within which to file objections. The Act prohibits the changing of a fee in the absence of an approved application.

Earnings

[4] Claimant's last year at Norshipco $16,910.65
Employment with Claimant's son
January 1983 - December 1984 ..... $15,500.00/year
(approximate)

1983 - 1984 loss
(16,910.65 - 15,500.00 x 2
is accordingly $2,821.30
Loss for period December 1984 to
June 1985 is 8,455.33
Total lost wages $11,276.63

ORDER

IT IS ORDERED that:

1. Employer shall reinstate Claimant to his former position with back pay in the amount of $11,276.63.
2. Employer shall pay the Deputy Commissioner a penalty in the amount of $1,000.00 pursuant to the provisions of Section 49 of the Act.

THEODOR P. VON BRAND
Administrative Law Judge

Supreme Court, U.S.
FILED
MAY 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

DOCKET No. 88-1648

IN THE

Supreme Court of the United States

October Term, 1988

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION

Petitioner,

v.

ROBERT T. NANCE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLARD J. MOODY, Jr.
MOODY, STROPLE
and KLOEPPEL, LTD.
Commerce Bank Building
500 Crawford Street
P. O. Box 1138
Portsmouth, Virginia 23705
(804) 393-4094

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

I. Was there sufficient evidence based on the record as a whole for the Administrative Law Judge to find employer, Norfolk Shipbuilding & Drydock Corporation, in violation of Title 33 U.S.C. § 948a and for the Benefits Review Board and the Fourth Circuit Court of Appeals to affirm that finding?

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Administrative Law Judge:

Nance v. Norfolk Shipbuilding & Drydock Corporation, 19 BRBS 115 (1986).[1]

Benefits Review Board:

Nance v. Norfolk Shipbuilding & Drydock Corporation, 20 BRBS 109 (1987).[2]

U.S. Court of Appeals:

Norfolk Shipbuilding & Drydock Corporation v. Nance, 858 F.2d 182, 21 BRBS 166 (CRT) (4th Cir. 1988),[3] *rehearing denied, suggestion for rehearing in banc denied,* Record No. 87-3892 (4th Cir. January 9, 1989).[4]

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[1] Benefits Review Board Service (Matthew Bender); App. p. 22a.

[2] App. p. 16a.

[3] App. p. 2a.

[4] App. p. 1a.

STATUTE INVOLVED IN DECISION

In pertinent part, 33 U.S.C. § 948a provides as follows:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this Act. Any employer who violates this section shall be liable to a penalty of not less than $100 or more than $1,000, as may be determined by the deputy commissioner. All such penalties shall be paid to the deputy commissioner for deposit in the special fund as described in section 44, and if not paid may be recovered in a civil action brought in the appropriate United States district court. Any employee so discriminated against shall be restored to his employment and shall be compensated by this employer for any loss of wages arising out of such discrimination: Provided, That if such employee shall cease to be qualified to perform his duties of his employment, he shall not be entitled to such restoration and compensation....[5]

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[5] Hereinafter referred to as § 49.

IN THE

Supreme Court of the United States

October Term, 1988
Docket No. 88-1648

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION

Petitioner,

v.

ROBERT T. NANCE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent, Robert T. Nance, respectfully prays that the Petition for a Writ of Certiorari of Norfolk Shipbuilding & Drydock Corporation, be denied.

STATEMENT OF THE CASE

This matter began when claimant, Robert T. Nance, Sr., filed various claims for benefits under the Longshoreman's and Harbor Workers' Compensation Act (LHWCA) for injuries he sustained while in the employ of the defendant, Norfolk Shipbuilding & Drydock Corporation, on April 1, 1975, April 28, 1980, October 11, 1980 and April 3, 1981. In addition to the claims for injuries filed, claimant filed a discrimination claim under § 49 of the LHWCA, a grievance to his union, a claim under the Age Discrimination and Employment Act (ADEA), and an age discrimination claim with the Equal Employment Opportunity Commission (EEOC). These claims all arose out of claimant's layoff which occurred in March of 1982. On January 13, 1983, claimant entered into a § 8 (i)(a) settlement agreement, (App. p. 25a) with the employer of all outstanding claims mentioned above that were pending at that time. The crux of the settlement was that in return for payment of $25,000.00 claimant was to withdraw and settle all of his *current claims* with reference to his employment at Norfolk Shipbuilding & Drydock Corporation that arose out of the 1982 layoff. At no time during these negotiations did he agree to voluntarily resign his position either orally or in writing. As shown by the face of the LS-471 form, which embodied the settlement agreement, there was *no reference* to the settlement of any disputes which would effect claimant's *employment status* at Norfolk Shipbuilding & Drydock Corporation.

Shortly after March 7, 1983, claimant received a letter from employer notifying him that he had been terminated and that all his insurance benefits had been cancelled. As a result of this termination of his employment with the employer, claimant brought this § 49 discrimination claim under the LHWCA. The employer's position or response to this § 49 claim was that the claimant had voluntarily relinquished his job position even though they had no documentation to that effect. Claimant's position was that he neither agreed orally or in writing to voluntarily relinquish his position with employer and that the employer's termination of the claimant was motivated in whole or in part by discriminatory animus towards claimant as a result of his claims for compensation.

The matter was heard at the OWCP level in an informal hearing and was referred to the office of the Administrative Law Judge (ALJ) for further adjudication.

The matter was heard on the merits on January 31, 1986. By decision and Order of August 4, 1986, the ALJ found employer had violated § 49 of the LHWCA, ordered the reinstatement of the claimant to his former position with back pay in the amount of $11,276.53 plus a penalty in the amount of $1,000.00. The employer moved to reconsider and reopen the record which motion was denied.

The decision of the ALJ was appealed to the Benefits Review Board (BRB). The BRB reviewed briefs and heard oral arguments submitted by employer's attorney, claimant's attorney and attorneys for the Department of Labor.[6] The Board subsequently affirmed the decision of the ALJ. This matter was then appealed to the United States of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the finding of the ALJ and the BRB. Employer petitioned the Fourth Circuit for a Rehearing in Banc which request was denied. The case is here on Petition for Writ of Certiorari.

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[6] The Department of Labor supported claimant's position that the evidence supported a finding of a Section 49 violation.

STATEMENT OF FACTS

On January 13, 1983, claimant and employer entered into a § 8 (i)(a) Form LS-471 agreed settlement in which they specified the terms of the settlement. When Mr. Nance was subsequently terminated, the defendant had no written documentation indicating that he had agreed to voluntarily relinquish his employment rights (App. p. 26a).

Prior to claimant's termination, he had a good work record as far as absenteeism, tardiness and accepting overtime work and no disciplinary action had ever been taken against him. He had worked his way up the seniority ladder to become a high ranking electrician first-class. As a result of his termination, claimant lost all of his health insurance, life insurance, vacation and paid holidays. He was only two years away from vesting in his pension rights at the time he was terminated. He was having financial difficulties at the time he entered into the agreed settlement with the employer. Claimant, emphatically denied having agreed to voluntarily quit his job either orally or in writing (App. p. 26a). He was physically able to return to his duties with the employer and desired to do so.

Employer's own evidence put in through Mr. Winston Smith, Director of Safety and Workmen's Compensation for the employer, showed that ninety-nine percent (99%) of employee lump settlements under the Act have culminated in the relinquishing of a employee's employment rights (App. p. 27a). Mr. Smith stated that he could recall only one case that was "very advantageous to the company" where an agreement for an employee to give up his job was not secured. The linking of an agreement for an employee to voluntarily quit his job as *quid pro quo* for a lump sum settlement is "standard procedure" for this employer. With reference to the claimant himself, Mr. Smith wanted to get rid of him because of friction that had built up between him and the company as a result of his compensation claim (App. p. 35a). It was the employer's feeling that a certain amount of friction has built up between the employer and the employee as a result of the claims under the LHWCA and that the company wanted a "clean slate" or basically just to get rid of employees who had made lump sum settlements.

SUMMARY OF ARGUMENT

There was substantial evidence in the record as a whole to support a finding by the ALJ, BRB and the Fourth Circuit Court of Appeals of a § 49 violation. Testimony showed not only direct evidence of specific intent to discriminate against Mr. Nance as a result of his particular compensation claim, but also generalized discriminatory animus against longshore claimants as a class. If an employer discriminates against an employee because he filed a compensation claim and because of other independent reasons, there is still a violation of § 49. *Geddes v. Benefits Review Board,* 735 F.2d 1412 (D.C. Cir. 1984).

The holding of the majority does not conflict with the decisions of this court nor the decisions of other courts interpreting § 49. The majority's finding of sufficient discriminatory intent should not be disturbed as this case does not present an important questions of federal law which requires the exercise of this court's supervisory powers and, consequently, review of the decision of the court below is not necessary.

ARGUMENT

I. *THERE WAS SUBSTANTIAL EVIDENCE PRESENTED AT TRIAL TO SUPPORT THE FINDING OF A VIOLATION OF SECTION 49 OF THE ACT.*

This is a case where the sole question upon which the Trial Judge based his decision was the sufficiency of the evidence to find a violation of § 49 by the employer. Both the Benefits Review Board and the Fourth Circuit Court of Appeals affirmed the finding of the ALJ based on the sufficiency of the evidence. That finding was based on a unique set of facts that are peculiar to Mr. Nance's compensation claim and his subsequent termination. The rulings of the courts below do not create any new exceptions to nor lessen the threshold of proof required to show a § 49 violation by an employer in a LHWCA case. The courts merely applied the existing law regarding § 49 violations to the specific set of facts presented in Mr. Nance's case.

The Fourth Circuit stated that its holding was limited to the finding that there was substantial evidence in the record to support a finding of a § 49 violation of the Act. The Court stated, "we do not address the broader question of whether the Board erred as a matter of law in holding Norfolk's general policy to be a violation of § 49" (App. p. 6a). The Fourth Circuit did not state that employees can not enter into agreements to waive their employment rights as part of a settlement in such a case. To the contrary, the employer continues to secure such agreements from its employees at this time. There has been no flood of § 49 claims as a result of this decision nor will there be any. Employer's assertions in this regard are merely a product of a fertile imagination in an attempt to manufacture grounds for this Court's review. Employer basically wants another bite at the same apple from another angle, one that it has already had before the ALJ, the BRB and the Fourth Circuit Court of Appeals. This case does not present an important Federal question of law and does not constitute any departure from accepted jurisprudence so as to require the exercise of this Court's supervisory power.

II. *THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THAT EMPLOYER'S DISCHARGE OF MR. NANCE WAS A VIOLATION OF SECTION 49 OF THE ACT.*

The ALJ, the Benefits Review Board and the Fourth Circuit Court of Appeals properly found that the employer's admission of a desire to get rid of claimant because of past friction arising from his compensation claim and the desire for a "clean slate" documented the retaliatory intent necessary to a finding of a § 49 violation. The ALJ stated the "employer's standard policy of terminating employees as part of a lump sum settlement procedure because of friction or hostility engendered by the claim process demonstrates generalized animus towards claimants as a class" (App. pp. 34a, 35a). In addition to this, the ALJ found other specific evidence of animus directed at the claimant. Based on both of these findings, and applying the appropriate standard of proof in § 49 cases, the evidence supports a finding of a violation.

Norfolkship argues that the courts below have affirmed the decision of the trial court on the basis of generalized animus that was not directed toward the claimant. The courts below held that not only was there evidence of animus towards a class of employees of which Mr. Nance was a member which brought about his termination, but, also *direct evidence of hostility and friction between the employer and the claimant brought on by his claim which resulted in his termination (App. p. 35a).* This is a case decided on the sufficiency of the evidence presented at trial and does not merit consideration of the precious time of this court. All the courts below have denied defendant's appeals to reverse the decision of the trial judge on the basis that there was insufficient evidence to support a finding of a § 49 violation. This Court should also deny employer's appeal.

In a § 49 case, the claimant has the burden of proof of a § 49 violation. The claimant's burden of proof is two-fold. First, there must be proof the employer committed a discriminatory act, such as the claimant's discharge in the case at hand. Second, the discriminatory act must be motivated by animus against the employee because of the employee's pursuit of his rights under the LHWCA. The second requirement of a § 49 claim is satisfied even

if the employer's action is *only partially motivated* by an employee's exercise of his rights under the LHWCA. Stated another way, "an employer who discriminates against an employee both because the employee filed a compensation claim and because of other, independent reasons, nonetheless violates § 49." *Geddes v. Benefits Review Board,* 735 F.2d 1412, 1415 (1984). *Gondolfi v. Mid Gulf Stevedores, Inc.,* 11 BRBS 295 (1979). A liberal standard of proof applies to claims alleging unlawful discrimination under § 49 of the LHWCA. Because of the humanitarian purposes of the Act and the rule that doubtful questions of law must be resolved in the favor of the claimant, the claimant's burden of proof is less than the standard of a preponderance of the evidence. *Gondolfi v. Mid Gulf Stevedores, Inc., supra. Martin v. General Dynamics Corp.,* 9 BRBS 836 (1978). The United States Court of Appeals for the District of Columbia in *Geddes v. Benefits Review Board* set out the burden of proof to be the following:

> "Claimant seeking relief under the act have long enjoyed the benefit of a light standard of proof in making their claims. The settled law articulated by the Supreme Court is that although a claimant seeking relief bears the burden of persuasion, the Act must be liberally construed in light of its beneficent and humanitarian purposes. Accordingly, claimants who seek compensation under the Act do not bear as a heavy a standard of proof as the one borne by plaintiffs in civil actions. A claimant is not required to prove his case by a preponderance of the evidence; instead, a lesser standard suffices. This lesser standard of proof requires that inferences be made and doubtful questions of fact be resolved in favor of the employee seeking benefits under the Act."

Geddes v. Benefits Review Board, supra at page 1416. The court in *Geddes* went on further to state that the proper rule is that once the claimant proves the employer committed a discriminatory act caused by animus, the evidentiary burden of proof shifts to the employer to prove that is animus was *not even partially motivated* by the employee's exercise of his rights under the act. The employer could not show this with respect to Mr. Nance's discharge.

Proof of employer's intent and animus may also be inferred from the facts and circumstances surrounding the discharge. *Curling v. Newport News Shipbuilding and Drydock Corporation,* 8 BRBS 770 (1978). Because proof of discriminatory animus is seldom neat or obvious, the circumstances surrounding the discharge must be examined to determine whether the employer's reasons for firing the employee is the actual motive or mere pretext. If the employee carries the burden of proof and the court so finds, the employer must reinstate the employee and compensate him for any loss wages due to the discrimination.[7]

It is the employer's admitted policy of insisting on securing a voluntary quit as part of a settlement of a compensation claim from each claimant who makes such a claim. Employer further stated that it is customary practice to retain almost no employee who enters into a settlement of his compensation claim (App. p. 27a). The fact that such a concession would have been solicited and obtained only because of claimant's having sought redress under the LHWCA demonstrates that his termination, whether voluntary or involuntary, was related at least in part, to his having "claimed or attempted to claim compensation from such employer", 33 U.S.C. 948a, and was prohibited by the LHWCA.

The record on which the ALJ based his decision is very revealing regarding the employer's reason for insisting on securing a voluntary quit as part of the settlement of a claim for compensation under the LHWCA. The employer's own witness, Mr. Winston Smith, an official for the company testified that ninety-nine percent (99%) of employee lump settlements under the Act have culminated in relinquishing of an employee's employment rights (App. p. 27a). The linking of an agreement for an employee to voluntarily quit his job as *quid pro quo* for a lump sum settlement is "standard procedure" for this employer (App. p. 27a). Mr. Smith stated that if they "do not secure a voluntary quit" they "do not settle." Clearly, this evidence shows that defendant highly disfavors employees who file claims under the Act. What employer is actually saying is they want to get rid of all such employees.

In addition to the evidence regarding this policy directed only

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[7] 33 U.S.C. 948a.

toward employees including Mr. Nance who make claims under the LHWCA, Mr. Smith testified to the *employers' intent with regard to Mr. Nance's termination specifically.*

Mr. Smith, the director of Safety and Workers' Compensation for employer states specifically that he wanted to get rid of the claimant in this case (App. pp. 28a, 29a). Some of the most compelling testimony offered by Mr. Smith is as follows:

> Q. Why do you include that as part of the settlement?
>
> A. Because normally, the employee is unhappy. The medical information is becoming conflicting, that there are several doctors involved. You build a hostility situation where no matter what you do everybody is not going to be happy.
>
> JUDGE VON BRAND: This is because of the previous dealings on the claim, is that correct?
>
> THE WITNESS:That is correct. So what you arrive at, a lump sum settlement to me means a clean slate for everyone, and off you go on with the rest of your life, and we close our books, and that is it. (App. p. 34a).

Then, the trial judge asked Mr. Smith, the employer's own witness, *specifically about* the compensation claim and termination of Mr. Nance as follows:

> JUDGE VON BRAND: Let me ask you this at this point. You are talking about a clean slate. If I understand you correctly is that what you are saying is that you felt that *in view of the preceding history of this worker's compensation claim* that there may have been some friction, and as result you wanted Mr. Nance out of the company for a clean slate, is that correct? (Emphasis added).
>
> THE WITNESS: That is correct. (App. p. 35a).

The employer cannot escape this direct evidence which clearly shows its intent and motive for terminating Mr. Nance.

Employer has cited several Title VII cases[8] to support the proposition that it can "escape liability" by showing a lawful reason for its discriminatory practice or act. (Petitioner's Brief p. 9). Basically what the employer is saying is that if it can put forth an independent pretext which appears lawful to shroud its actual motive, then it can "escape liability". This is not the law in § 49 cases. Section 49 has been violated if the discharge was *even partially motivated by animus* against a Claimant who files a compensation claim and it makes no difference that the discharge may have been motivated by other factors as well. *Geddes v. Benefits Review Board, supra; Machado v. National Steel and Shipbuilding Co.*, 9 BRBS 803 (1978); *Dill v. Sun Shipbuilding & Dry Dock Co.*, 6 BRBS 738 (1977); *Winburn v. Jeffboat, Inc.*, 9 BRBS 363 (1978). Employer's assertions of other motives do not vitiate a finding of a § 49 violation in light of the direct evidence of discriminatory animus directed at Mr. Nance. As stated in *Geddes*, "an employer who discriminates against an employee both because the employee filed a compensation claim and because of other, independent reasons, nonetheless violates § 49." *Geddes*, at 1415.

The cases cited by the employer regarding unfair labor practices or union activity are distinguishable from the case at hand. In those cases, there was no direct evidence of discriminatory animus directed at a particular employee. This is not so in Mr. Nance's case. The employer could not show that its termination of Nance was wholly unrelated to Nance's assertion of rights under the LHWCA. The employer could not rebut the evidence that its animus toward Mr. Nance as a result of his claim did not contribute at all to his discharge. Under the cases interpreting § 49, this evidence requires a finding that his discharge was motivated by discriminatory animus in violation of § 49.

The employer cites several ADEA cases for the proposition that insistance on a waiver of employment rights is a practice sanctioned by the courts. Those cases involve situations where employees have lost jobs and bring actions for damages for such loss and not for personal injuries. The courts hold that ADEA

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[8] 42 U.S.C. § 2000e *et seq*

claims can be settled by an unsupervised release. We do not disagree. But, Mr. Nance's claim was based on his injuries and not the loss of his employment rights. His claim was to be settled pursuant to the LHWCA for fair compensation for injuries, not the loss of his job. There is nothing in the LHWCA that sanctions the practice of requiring an employee to give up his job as part of obtaining a fair settlement for his injuries. In the ADEA cases, the claimant is settling exactly what the claim is for, loss of employment. The employer in this case wants to settle the injury claim only if it can secure a relinquishment of the employee's job at the same time. What the employer wants is a two for one bargain. It was recognized that employer's motive for insistence on such a term is its disfavor of compensation claimants and its desire to get rid of them. This decision does not effect the LHWCA lump sum settlements of valid claims and will not do so in the future. Defendant just wants to be able to take a job along with the settlement of an injury claim which is contrary to the intent and the beneficent purpose of the Act. This was recognized by the Benefits Review Board in its decision. The decision of the majority below should be not be disturbed.

III. *THERE IS NO CONFLICT IN THE HOLDING IN THIS CASE AND THE DECISION IN HOLLIMAN V. NEWPORT NEWS SHIPBUILDING & DRYDOCK COMPANY OR GEDDES V. BENEFITS REVIEW BOARD.*

The decision of the Fourth Circuit in *Holliman v. Newport News Shipbuilding and Drydock Company*, 852 F.2d 759 (4th Cir. 1988) is factually distinguishable and legally consistent with the decision below. In *Holliman*, the employer's policy in question did not single out and apply only to those employees out of work due to occupational injury. It applied to those off work due to illness as well as occupational injury. Therefore, the underlying policy that resulted in Holliman's discharge was not directed at compensation claimants and not discriminatory in violation of § 49. In the case at hand, the policy of the employer is directed specifically toward only those who claim compensation and wish to settle, and, was directed at Mr. Nance, individually, not at the general work force as in *Holliman*. Here the policy and practice

in application discriminates against those who sustained on the job injuries and bring compensation claims. In addition to the evidence regarding employer's policy, the courts below found evidence of specific discriminatory animus directed at Mr. Nance. These findings completely fulfill the burden of proof requirements set out in *Geddes* and *Holliman* that the discriminatory act be motivated at least in part by animus directed at the claimant that arises out of his filing of a compensation claim under the Act. The court below never held that a § 49 claim can be proved by evidence of a discriminatory animus in the abstract not directed at the aggrieved party and is not in conflict with the law set out in *Holliman* and *Geddes*. The evidence which was the basis of the ALJ's decision was direct evidence of employer's hostility toward Mr. Nance as a result of his claim for compensation. Employer has already requested the Fourth Circuit to reconsider its opinion on the basis of conflict in the decisions and was denied its petition for rehearing on those grounds. Obviously, the Fourth Circuit does not find any inconsistencies in the decisions. There is no conflict in the law which requires the exercise of this Court's supervisory power to correct.

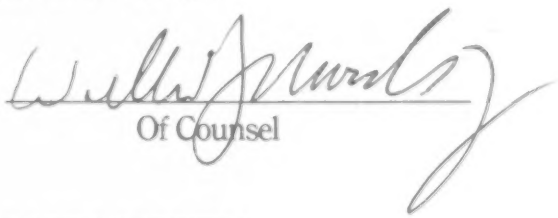
Employer's next argument that these cases cannot now be settled due to this decision is far from the truth. This decision has not affected defendant's ability to fairly settle its injury claims under the Act. Obviously, if the decision has not affected the claim's process of the employer itself, it is not a decision that has caused sufficient impact to be of national import which deserves a review. This case is a specific factual situation unique to itself and will not affect the LHWCA § 49 decisions. This case should stand on its specific facts and not be reviewed by this Court.

CONCLUSION

For the above stated reasons, the respondent, Robert T. Nance, prays that the Petition for a Writ of Certiorari of the petitioner, Norfolk Shipbuilding & Drydock Corporation, be denied.

RESPECTFULLY SUBMITTED,

- ROBERT T. NANCE

BY 
Of Counsel

WILLARD J. MOODY, Jr.
MOODY, STROPLE and
KLOEPPEL, LTD.
P. O. Box 1138
Portsmouth, Virginia 23705-1138
(804) 393-4093

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Brief in Opposition to Petition for a Writ of Certiorari upon the Petitioner, Norfolk Shipbuilding & Drydock Corporation, at the office of its counsel of record, F. Nash Bilisoly, Vandeventer, Black, Meredith & Martin, 500 World Trade Center, Norfolk, VA 23510; to Jeffrey Ross, Esquire, Solicitor of Labor, U.S. Department of Labor, Suite N-2716, NDOL, 200 Constitution Avenue, N.W., Washington, D.C. 20210; and to Solicitor General, Department of Justice, Washington, D.C. 20530, pursuant to the requirements of Rules 28 and 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with First-Class postage prepaid, addressed as set forth above, on or before May 8, 1989.

I further certify that I am a member of this Court, and that all parties required to be served have been served on or before May 8, 1989.

Raymond H. Stropple
Of Counsel for Respondent

RAYMOND H. STROPLE
MOODY, STROPLE and
KLOEPPEL, LTD.
P. O. Box 1138
Portsmouth, Virginia 23705-1138
(804) 393-4093

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Record No. 87-3892

Norfolk Shipbuilding & Drydock Corporation,

Petitioner,

v.

Robert T. Nance,

Respondent.

Decided on January 9, 1989

On Petition for Rehearing and Suggestion for Rehearing In Banc

The petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to the Court.

On the question of rehearing before the panel, Judge Murnaghan voted to rehear the case. Judges Winter and Sprouse voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Russell, Widener, Murnaghan, Chapman, ar.d Wilkins voted to rehear the case in banc; and Judges Winter, Hall, Phillips, Sprouse, and Ervin voted against in banc rehearing. Judge Wilkinson disqualified himself from voting in the poll.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as the judges were equally divided in the poll,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Record No. 87-3892

Norfolk Shipbuilding & Drydock Corporation,

Petitioner,

v.

Robert T. Nance,

Respondent.

Argued July 6, 1988
Decided on September 27, 1988

Before WINTER, Chief Judge, and MURNAGHAN and SPROUSE, Circuit Judges.

HARRISON L. WINTER, Chief Judge:

Norfolk Shipbuilding & Drydock Corporation (Norfolk) petitions to set aside an order of the Benefits Review Board (the Board) affirming the decision and order of an Administrative Law Judge that required Norfolk to reinstate Robert T. Nance to his former position with back pay and to pay a penalty to the Deputy Commission.[1] The decision and order were entered pursuant to § 49 of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C.§ 948a (1976) (the Act)[2]. The ALJ found that Nance had proved that Norfolk retaliated against him in violation of § 49 of the Act by discharging him from his job after the parties entered

[1] Nance v. Norfolk Shipbuilding & Dry Dock Corporation, No. 86-2436, 20 Ben.Rev.Bd.Serv. (MC) 109 (Nov. 23, 1987)

[2] The statute, in pertinent part, reads as follows:

into an agreement to settle Nance's pending claims for disability compensation, age discrimination and discrimination under § 49, and a grievance to his union.

The principal questions before us are whether testimonial evidence purportedly demonstrating that Nance voluntarily agreed to quit his job as partial consideration for the settlement was erroneously excluded by the ALJ, and whether the Board erred in sustaining the ALJ's finding that Norfolk had the requisite discriminatory intent to violate § 49.

We perceive no reversible error on the part of the ALJ or the Board, and conclude that the Board's order should be affirmed and enforced.

I.

On January 13, 1983, Norfolk and Nance entered into an agreement to settle Nance's various claims against Norfolk for a lump sum payment. They stated the terms of the settlement on a government settlement form, Form LS-471, signed by their respective counsel, and submitted it to the Deputy Commissioner, all as required by 33 U.S.C. § 908(i) and 20 C.F.R.§ 702.241-243. On the same day, the agreement was approved by Deputy Commissioner Basil Voultsides of the Office of Workers' Compen-

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It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this Act. Any employer who violates this section shall be liable to a penalty of not less than $100 or more than $1,000, as may be determined by the deputy commissioner. All such penalties shall be paid to the deputy commissioner for deposit in the special fund as described in section 44, and if not paid may be recovered in a civil action brought in the appropriate United States district court. Any employee so discrimnated against shall be restored to his employment and shall be compensated by this employer for any loss of wages arising out of such discrimination: Provided, That if such employee shall cease to be qualified to perform his duties of employment, he shall not be entitled to such restoration and compensation...

sation Programs. As the ALJ found, the LS-471 did not contain a "provision expressly or impliedly permitting Employer to discharge Claimant after consummation of the settlement." In addition to making no mention that Nance would be discharged or that he would quit his employment, the parties described the type of employment that Nance, despite his injuries, could still perform. Shortly after March 7, 1983, Nance, who had been in lay-off status, received a letter from Norfolk advising him that his job had been terminated and all of his insurance benefits had been cancelled. Before the ALJ, Norfolk proffered evidence that as part of the settlement Nance and it had verbally agreed that Nance's employment would be terminated. Nance's proffered evidence was a denial of the existence of any such agreement. The ALJ ruled that Norfolk's evidence was inadmissible and he refused to receive it.

Noting that Paragraph IV of Form LS-471 provides for "Action of the Deputy Commissioner" in order to make the settlement effective, the ALJ concluded that settlement procedures under the Act clearly contemplated that the complete agreement must be set forth in writing as a prerequisite to approval:

> [T]he text of an LS-471 makes it clear that agreements extrinsic to that document are not to be considered in the approval process. It is apparent from the face of the LS-471 that it is intended to be the complete and integrated statement of the agreement between Claimant and Employer. Nor are there any ambiguities in the document requiring resolution. The LS-471 must, on its face, be considered an integrated agreement incorporating into a single written memorial all prior negotiations. There is accordingly, a conclusive presumption that the LS-471 incorporates the whole contract and is the sole evidence of the agreement. Employer may not, therefore, adduce evidence to show that Claimant had as a part of the settlement agreed to voluntary termination of his employment after the settlement in an attempt to vary the terms of the agreement.

Accordingly, he refused to receive Norfolk's evidence of an oral agreement as part of the settlement to terminate Nance's employment.

The ALJ further found the requisite discriminatory intent for a §49 violation in Norfolk's testimony as to why it sought a voluntary termination agreement. Norfolk employees testified that Norfolk had a practice of settling only those compensation claims in which the employee agreed to leave his or her job. The ALJ decision quoted the following testimony by Norfolk's Director of Safety and Workmen's Compensation:

> All lump sum settlements have worked around the employee voluntarily quitting. The employee is usually unhappy at that point, and we want a clean slate.
>
> * * * * * * * *
>
> [N]ormally, the employee is unhappy. The medical information is becoming conflicting, that there are several doctors involved. You build a hostility situation where no matter what you do everybody is not going to be happy.
>
> ALJ: This is because of the previous dealings on the claim, is that correct?
> Witness: That is correct. So what you arrive at, a lump sum settlement to me means a clean slate for everyone and off you go on with the rest of your life and we close up our books, and that is it.
>
> * * * * * * * *
>
> ALJ: You are talking about a clean slate. If I understand you correctly is that what you are saying is that you felt that in view of the preceding history of this Workers' Compensation claim that there may have been some friction, and as a result you wanted Mr. Nance out of the company for a clean slate, is that correct?
> Witness: That is correct.

On the basis of what he terms "generalized animus against longshore claimants as a class" because of friction engendered in the claim process, and specific testimony that Norfolk wanted a "clean slate" in the case of Nance, the ALJ found that Norfolk discriminated against Nance for filing a compensation claim in violation of 33 U.S.C. § 948a.[3]

Finding sufficient specific evidence of retaliatory intent in the case before him, the ALJ declined to reach the question of whether Norfolk's policy of conditioning settlement on voluntary termination was consistent with § 49. But on appeal, the Board ruled, in addition to affirming the findings and conclusions of the ALJ, that Norfolk's general policy of conditioning settlements upon a termination of employment was a violation of § 49 as a practice running "counter to the beneficent purpose of the Act."

II.

This appeal presents two issues: whether the ALJ correctly excluded the proffered evidence; and whether there was substantial evidence of discriminatory intent against Nance to hold Norfolk in violation of Section § 49, or, in the alternative, whether the Board erred in holding that Norfolk's general policy of conditioning settlement on voluntary termination agreements violated the Act. Because we conclude that the ALJ correctly excluded the proffered evidence of the alleged oral agreement, and because we conclude that there was substantial evidence to support the finding of a violation of § 49 of the Act, we do not address the broader question of whether the Board erred as a matter of law in holding Norfolk's general policy to be a violation of § 49.[4]

III.

In reviewing cases arising under the Act, our standard of

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[3] *See* n. 2, *supra*.

[4] The Board's ruling, in this respect, necessarily encompasses fact patterns, such as a settlement on Form LS-471, which are not present in this case. We think that it is premature in this case to address the issue.

review is limited to the determination of whether the ALJ's findings are supported by substantial evidence in the record considered as a whole. If findings are so supported and are not arbitrary, they may not be disturbed. *Dickens v. Tidewater Stevedoring Corp.*, 656 F.2d 74, 76 (4 Cir. 1981).

The ALJ rejected Norfolk's proffered evidence of an oral agreement partly on the basis of the parole evidence rule. The parole evidence rule is a substantive rule of law, not a rule of evidence, which bars the admission of extrinsic evidence to vary or contradict the terms of a complete and integrated written agreement. While the ALJ referred explicitly to the rule, he also noted that the settlement form itself requires that the Deputy Commissioner approve settlements on the basis of the information disclosed in the form. The Board further noted that the Act both requires such approval and prohibits an employee from waiving rights to compensation except through approved settlements. Section 8(i)(1), 33 U.S.C. § 908(i)(1), provides that the settlement be approved only under certain conditions:

> [T]he deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress.... No liability of an employer ... shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge....

Claimants are not permitted to waive their right to compensation except through settlements approved by the deputy commissioner, *see* 33 U.S.C. § 915, 916. A regulation passed pursuant to the Act, 20 C.F.R. § 702.242(a), expressly provides that the Form LS- 471 must be a "self-sufficient" document, and 20 C.F.R. § 702.242(b)(1) further provides that the settlement agreement include "[a] full description of the terms of the settlement....."[5] Thus this appeal

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[5] Norfolk contends on appeal that the alleged voluntary termination agreement was not a part of the settlement agreement and therefore should not be held to these statutory procedures. We disagree. The provision of 20 C.F.R. § 702.242(a) that such agreements be self-sufficient mandates that the agreement

(Footnote continued on following page)

presents an even stronger case for the exclusion of evidence not disclosed in the settlement form than a case involving a general application of the parole evidence rule in administrative proceedings. The terms of the settlement agreement, in conjunction with the statutes and regulations that govern its effect, prohibit enforcement of any verbal agreement by Nance to leave his job not included in the settlement terms set forth in the LS-471 agreement.[6] The ALJ and Board were therefore not only

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(Footnote continued from preceding page)

be included, at least where, as in this case, the alleged agreement to quit was in partial compensation for monies listed in the Form LS-471. 20 C.F.R. § 702.242(a) provides:

> The settlement application shall be a self-sufficient document which can be evaluated without further reference to the administrative file. The application shall be in the form of a stipulation signed by all parties and shall contain a brief summary of the facts of the nature of the injury to include the degree of impairment and/or disability, a description of the medical care rendered to date of settlement, and a summary of compensation paid and the compensation rate or, where benefits have not been paid, the claimant's average weekly wage.

Furthermore, 20 C.F.R. § 702.242(b) requires that the terms of the settlement be set forth in detail:

> (b) The settlement application shall contain the following:
>
> (1) A full description of the terms of the settlement....
>
> (2) The reason for the settlement, and the issues which are in dispute, if any.
>
> * * * * * *
>
> (4) Information on whether or not the claimant is working or is capable of working....
>
> * * * * * *
>
> (6) A statement explaining how the settlement amount is considered adequate.

[6] The Deputy Commissioner having considered the foregoing Application for Approval of an Agreed Settlement and *the best interests of the employee concerned having been considered, as required by section 8(i) (A) and (B) of the Act, it is determined that payment of compensation and/or medical benefits pursuant to the said agreement would be for the best interests of the employee.* A compensation order will be prepared by the Deputy Commissioner formally approving this agreed settlement and fixing the amount of the attorney fee. Payment is not to be made by the carrier or the employer until this order is filed in the Office of the Deputy Commissioner. (Emphasis supplied)

justified in regarding the settlement form as a complete, unambiguous, and self-sufficient document, but they would have lacked authority to enforce an extrinsic verbal agreement as part of the Act's approval process, even if the ALJ had admitted evidence of such an agreement and found it credible.

Norfolk argues that the § 49 claim discharged in the settlement agreement refers to the instant legal proceedings. But this can not be so, because it would be absurd for the agreement to anticipate and discharge a § 49 claim which had not yet arisen. Moreover, even if such a vague reference to § 49 somehow anticipated the instant litigation, such a reference would not be a sufficient disclosure under the Act and regulations, *see* 29 C.F.R. § 702.242(b)(1) ("a *full* description of the terms") (emphasis supplied), of the settlement to allow the Deputy Commissioner to make an informed review of the parties' Form LS-471.

Norfolk further contends that because the ALJ and Board found that its practice of seeking voluntary termination as a part of any settlement was evidence of discriminatory intent, both administrative decisions are internally inconsistent in ignoring the alleged application of this practice in the case of Nance. While this line of reasoning may appear persuasive at first glance, a closer analysis of the ALJ and Board's position persuades us that their positions are not internally contradictory. The evidence of Norfolk's general practice of seeking voluntary terminations, and its desire to obtain such an agreement in its negotiations with Nance, is highly probative as to whether Norfolk had the requisite discriminatory intent in discharging Nance. However, the finding of discriminatory intent does not, in itself or by logical implication, entail a finding that Norfolk and Nance did, in fact, enter into such a voluntary termination agreement. Whether or not such an agreement was entered into, Norfolk's testimony on its desire to enter into such an agreement in the case of Nance in order to "clean the slate" of friction or hostility associated with his claim is substantial evidence of discriminatory intent.

We therefore conclude that the finding that Norfolk had discriminatory intent and thus violated § 49 is supported by substantial evidence and should not be disturbed.

IV.

Norfolk's further contentions that the Board's decision is contrary to the policy of the Act and unlawfully modifies the settlement agreement are, in light of what is said above, without merit.

AFFIRMED; ENFORCEMENT GRANTED.

MURNAGHAN, Circuit Judge, dissenting:

The Norfolk Shipbuilding & Drydock Corporation (Norfolk Ship) made a slight but significant error, which may or may not be decisive here insofar as the order to reinstate Robert T. Nance with back pay is concerned. It simply failed to cross all the t's and dot all the i's by not complying exactly with the Government's settlement form LS-471. The ALJ, the Benefits Review Board, and most recently the majority have employed various legal and logical gymnastics to convert that failure at contract integration into a breach by Norfolk Ship of the statutory prohibition on employers from discriminating against employees who file Longshore and Harbor Workers' Compensation Act (LHWCA) claims.

I disagree with the conclusion that there was discrimination as set forth in section 49 of the LHWCA, 33 U.S.C. § 948a, by reason of supposed retaliation by discharging Nance from his job after the parties entered into an agreement to settle pending claims for disability compensation, age discrimination, discrimination under section 49 and a grievance to his union. I would, therefore, reverse the decision of the Benefits Review Board.

Norfolk Ship believed, as the ALJ agreed, and even the majority leaves unchallenged (since it does not reach the issue) the finding that Norfolk Ship believed that Norfolk Ship could properly condition settlement of LHWCA claims upon voluntary termination of employment by the employee. It was further found that Norfolk Ship has acted uniformly to require termination in every case where such a belief has come into play. In the circumstances, I fail to perceive discrimination, either as retaliation or in any other form, as a result of attempted implementation of that honestly held belief.

Norfolk Ship has discharged Nance on an erroneous belief that he agreed to resign. Since he had not agreed to resign he might have a right to reinstatement, back pay or other damages. However, such rights do not arise under the LHWCA. The LHWCA only provides for reinstatement and back pay when an employee is discriminated against in retaliation for bringing a LHWCA claim. That did not occur in the present case so reinstatement rights did not accrue under the LHWCA. Rather, an employee was discharged on the erroneous belief that he had agreed to resign. Nance's right to force Norfolk Ship to rectify its error, if it exists, must come from some other source, e.g., a union contract, common or other statutory law. The existence vel non of such other rights is not before the Court.

To reach a conclusion of discrimination as the majority has done seems to disregard the holding in *Ellett v. Giant Food, Inc.*, 66 Md.App. 695, 505 A.2d 888 (1986). The LHWCA operates as the workers' compensation law for the District of Columbia. Ellett filed a claim under the LHWCA that was pending when she was discharged from Giant's employ. Several months following the discharge she and Giant settled the LHWCA claim. In that agreement, Ellett agreed that she had no section 49 claim. She later brought an alleged abusive discharge claim. The Court of Special Appeals of Maryland affirmed the entry of summary judgment on that claim in favor of Giant. The court indicated that, when she agreed that she had no section 49 claim, she agreed that she had not been fired in retaliation for claiming compensation. Her statement was tantamount to a release and the court would not allow her later to repudiate it. *Id.* 66 Md.App. at 701-02, 505 A.2d at 871.

In that case, Giant had fired Ellett, and was not prohibited from, after the fact, negotiating an agreement with her that she had not been fired in retaliation for claiming LHWCA compensation. Logically then, an employer should be able to do the reverse under the LHWCA, namely,negotiate a waiver of section 49, *i.e.*, condition the settlement on a right to discharge, prior to making the settlement.

The Board concluded that the LHWCA prohibits such agreements and that even the attempt by Norfolk to negotiate for

one is retaliatory. The majority did not reach the issue of whether the LHWCA prohibits such agreements, it concluded that the ALJ properly found discriminatory intent under the facts of the case. Because I believe, and will later show, that the ALJ's finding of discriminatory intent under the facts of the present case is irrational, I reach the issue left open by the majority.[1] Not only was the Board's decision that the LHWCA prohibits the employer from negotiating for and accepting an employee's resignation as a term of a settlement of LHWCA claims without citation, but the only reason it gave for its decision was its belief that the beneficent purpose of the LHWCA required its results. That conclusion is at odds with the general federal policy in favor of settlements, at odds with analogous authority and at odds with the LHWCA.

Those cases considering an analogous issue — whether an employee can waive his or her remedial rights in settlement of an employment discrimination claim find that employees can waive. The cases are analogous to the LHWCA because an agreement to waive remedial rights like reinstatement and back pay under equal employment opportunity laws is equivalent to an agreement to waive a section 49 claim or an agreement to resign. All mean that the claimant will not invoke a right to challenge a dismissal. Courts construing Title VII and the like have not adopted a flat prohibition on the waiver of remedial rights as the Board did in the present case. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n. 15, 94 S.Ct. 1011, 1021-22 n. 15, 39 L.Ed.2d 147 (1974) (presuming that employee can waive a cause of action under Title VII as a part of a voluntary settlement); *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339 (11th Cir. 1983); *Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207 (5th Cir. 1981) (holding that an oral agreement to settle a Title VII claim is enforceable).

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[1] It is irrational and arbitrary to conclude that Norfolk Ship discriminated against Nance while simultaneously concluding that it acted pursuant to what it believed was its contractural right. In order for such conduct to be "discriminatory" for section 49 purposes, the acquisition itself of the contractural right and hence the belief of its existence must be forbidden. The Board recognized that logical necessity and found that the acquisition of the right is forbidden. I recognize that logical necessity *vel non* must be pursued and reach the issue but agree with the Board's interpretation of the LHWCA.

(Footnote continued on following page)

Additionally, to the extent that there is a difference between settlement of employment discrimination claims and LHWCA claims, that difference militates in favor of more generous court recognition of LHWCA settlements. Under the LHWCA, settlements are void unless approved by the deputy commissioner or the ALJ. 33 U.S.C. §§ 915, 908(2)[2]. Therefore, it is less likely that employers will overreach with LHWCA settlements since neutral third party approval of them is first required. Further, section 8 of the LHWCA, 33 U.S.C. § 908, in providing for settlement approval does not differentiate among the LHWCA claims that can be settled. There is no suggestion that while other LHWCA claims can be settled, a section 49 claim cannot be settled.

Although the Board's approval of the ALJ's decision is not supported by the proffered justification, I would, nevertheless, consider any other possible reasons to support the ALJ's decision. The ALJ offered another. He found that while a section 49 waiver or an agreement to resign might not flatly be prohibited, there was no such agreement in the present case, and that Norfolk Ship's termination of Nance was retaliatory since done pursuant to a Norfolk Ship standard policy of terminating all lump sum settlement recipients. That justification is the one upon which the majority basis its affirmance.

While I agree with the first part of the conclusion of the ALJ, that there was no enforceable agreement of Nance to resign, I cannot agree with the second. The ALJ found as a fact that Norfolk

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The majority suggests that the logical quagmire that I posit while persuasive at first glance disaapears on furthur reflection. For me it does not disappear. The import of the majority's reflection is somewhat lost on me, but it suggests that the inconsistency can be removed if one considers that Norfolk Ship and Nance may *not* have agreed for Nance would resign. *See, supra,* at 187. Whether Norfolk Ship and Nance agreed for Nance to resign is not relevant to this claim of discrimination. As majority has persuasively pointed out, because such an agreement was not made part of the Form LS-471, Norfolk Ship and Nance did not *enforceably* agree for Nance to resign.

The majority suggests that whether they actually agreed for Nance to resign and made a mistake in integration or whether they never agreed is important to resolution of whether Norfolk Ship discriminated against Nance. It is not. What is critical in the present case alleging discrimination is Norfolk Ship's intent.

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Ship acted on a sincere belief, later proved erroneous, "that a voluntary quit by Mr. Nance was included in the settlement." 19 Ben.Rev.Bd.Serv. (MB) 115 (ALJ), 124 (ALJ) (Aug. 4, 1986). Yet he nonetheless found discrimination, a section 49 violation, by virtue of Norfolk Ship's uniform practice of asking a claimant to give up his or her right to employment in order to settle a LHWCA compensation claim. That finding is arbitrary and should be set aside. *Dickens v. Tidewater Stevedoring Corp.*, 656 F.2d 74, 76 (4th Cir. 1981).

On the one hand the ALJ assumed that Norfolk Ship could, upon an honest belief that it was entitled to do so, ask for, negotiate and accept a waiver of an employee's right to employment as part of a settlement. If found that Norfolk Ship thought that it had, in the present case, done so. Yet when Norfolk Ship attempted to act pursuant to that belief, though implementation was flawed, the ALJ found the action impermissibly retaliatory. That elevates form over substance and irrationally whipsaws Norfolk Ship. Under the ALJ's resolution, Norfolk Ship's behavior would have been proper, the resignation provision enforceable and the section 49 claim barred had the resignation provision been properly written into the settlement agreement. The ALJ's resolution allows the mere failure of integration into the written document to give rise to a retaliation claim, while admitting that including such a provision would have been in order. The failure to put a term requiring termination of employment into the agreement means that Norfolk Ship cannot enforce that term because it is not part of the agreement. Thus, Norfolk Ship had no right to terminate Nance on the basis of the settlement agreement. Since Norfolk Ship did not have that right

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Holliman v. Newport News Shipbuilding and Dry Dock Co., 852 F.2d 759 (4th Cir. 1988). The ALJ found that Norfolk Ship believed that Nance had agreed to resign. That is the critical inquiry, and it was resolved by the ALJ.

If Norfolk Ship believes that Nance agreed to resign it does not discriminate against him when it terminates him *unless* its acquisition of the right (and belief) that Nance agreed to resign is itself discriminatory under the LHWCA. That issue must be reached to decide the case.

[2] *See supra* at 185-186 where the majority opinion discusses procedures incident to settlement approval.

it may have to rehire him. However, such a right to reinstatement would come, not under the LHWCA, but under an employment agreement like a union contract or perhaps under a common law or other statutory right. If Nance has such a right he can enforce it under its terms. I offer no opinion on the existence or enforceability of such a right since the issue was not presented to this Court.

In the present case, Nance attempts to enforce a right to continued employment of another sort, the right to continued employment after making a LHWCA claim. That right is breached if the employer fires a claimant because he filed a claim. But that is not this case. Norfolk Ship fired Nance because it thought that he had agreed to be terminated. It was an incorrect reason but it was not an impermissible one.

A section 49 claim necessarily looks to the intent of the employer. The employer must have a retaliatory intent. *Holliman*, at 760-761 *(citing Geddes v. Benefits Review Board,* 735 F.2d 1412 (D.C. Cir. 1984)). Here, the ALJ found that Norfolk Ship believed that it had a contractual right to terminate Nance. That is conclusive proof of lack of retaliatory intent, of intent to discriminate.

The ALJ (and the majority in its affirmance) instead, in a twist of logic, somehow inferred that the policy of asking for, negotiating and accepting such waivers to continued employment was tantamount to a discriminatory intent. That inference might be appropriate in a case in which there is little or no direct evidence regarding the employer's intent, but that is not the case at bar. The ALJ concluded that Norfolk Ship terminated Nance because it thought it had a contractual right to do so. To infer in the face of that finding that the termination was in retaliation for claiming compensation under the LHWCA is irrational and arbitrary and should be set aside.

I would reverse the Board and, therefore, dissent.

UNITED STATES DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

BRB No. 86-2436

Robert T. Nance

Claimant-Respondent

v.

Norfolk Shipbuilding & Dry Dock Corporation

Self-Insured
Employer-Petitioner

Director, Office of Workers'
Compensation Programs, United States Department of Labor

Party-in-Interest

Decided on November 23, 1987

PER CURIAM:

Employer appeals the Decision and Order (80-LHC-357 and 82-LHC-74) of Administrative Law Judge Theodor P. Von Brand awarding benefits pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The Board heard oral argument in this case on September 10, 1987, in Norfolk, Virginia.

Facts and Procedural History

Claimant worked as an electrician for employer at various times from 1947 until March 1982, when he was laid off. In January

1983, claimant and employer entered into an agreement to settle several disability claims which had been filed pursuant to the Act, as well as a discrimination claim made pursuant to Section 49 of the Act, 33 U.S.C. §948a, an Equal Employment Opportunity claim, and a union grievance which had all been filed in response to the March 1982 layoff. The settlement application provided that claimant would receive a lump-sum payment of $25,000, plus attorney's fees and costs, in exchange for withdrawing "all...claims pending against [employer]." The settlement was approved by Deputy Commissioner Basil Voultsides, pursuant to 33 U.S.C. §908(i)(A) (1972) (amended in 1984), on January 13, 1983. Claimant received his $25,000 lump-sum payment in February 1983.

In March 1983, claimant received a letter indicating that his employer-sponsored health-insurance coverage had been terminated as of March 1, 1983. Claimant construed this letter as notice that his job with employer had been terminated. He did not receive any other communication from employer regarding his employment status, and he did not return to his former job.

Claimant subsequently challenged the termination of his employment by filing a claim pursuant to Section 49 of the Act, 33 U.S.C. §948a. Employer, maintaining that claimant had agreed to relinquish his job as part of the January 1983 settlement, attempted to introduce hearing testimony allegedly demonstrating that claimant had orally consented to "voluntarily quit" his job as a condition of the settlement.[1] In a pre-hearing ruling, the administrative law judge declined to allow submission of this evidence, based on his determination that the parties' settlement application constituted an "integrated agreement incorporating into a single written memorial all prior negotiations." and that admission of the testimony which employer sought to introduce was thus precluded by the parol evidence rule. The administrative law judge nonetheless stated that he would allow employer's officials to testify as to the nature of the parties' settlement negotiations, as such testimony would address claimant's termination and thus would be relevant to the disposition of

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[1] The settlement application itself does not address the matter of whether claimant's employment status would be affected by the parties' agreement.

claimant's Section 49 claim. After a formal hearing was held, the administrative law judge issued his Decision and Order, in which he again denied admission of the evidence he had excluded in his pre-hearing ruling. In addition, the administrative law judge determined that employer's termination of claimant's job constituted a violation of Section 49 of the Act, and ordered employer to reinstate claimant in his former position, pay him appropriate back wages, and tender a $1,000 penalty to the deputy commissioner for deposit in the Special Fund. *See* 33 U.S.C.§§944, 948a. Employer's subsequent motion for reconsideration of the Decision and Order was denied.

On appeal, employer challenges the administrative law judge's finding that employer, in terminating claimant's job, possessed the discriminatory intent requisite to establishing a Section 49 violation. Employer additionally assigns error to the administrative law judge's refusal to allow submission of the evidence excluded in his pre-hearing ruling, and his resultant determination that claimant did not orally agree to relinquish his job as a condition of the parties' 1983 settlement. Claimant and the Director, Office of Workers' Compensation Programs, respond that the finding of a Section 49 violation should be upheld.[2] The Board must affirm the administrative law judge's Decision and Order if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Discussion

The dispositive issue presented by this appeal is whether the administrative law judge properly determined that claimant's job was terminated in retaliation for having pursued and obtained a lump-sum settlement of his work-related clams, in violation of Section 49 of the Act.

Section 49 provides, in pertinent part, that:

> It shall be unlawful for any employer...to discharge or in any other manner discriminate

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[2] By letter dated August 23, 1987, the Director filed his statement of position in this case. Employer responded on September 2, 1987. These documents are accepted into the record.

> against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer.... Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: Provided, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation.

33 U.S.C. §948a. To prevail on a claim filed pursuant to Section 49, the claimant must prove that a discriminatory act, motivated by discriminatory animus, has been committed by the employer. *Geddes v. Benefits Review Board,* 735 F.2d 1412, 16 BRBS 88 (CRT) (D.C. Cir. 1984). Once these threshold elements have been established, the employer may defeat the claim by demonstrating that its action was not motivated, even in part, by the claimant's exercise of his rights under the Act. *Tibbs v. Washington Metropolitan Area Transit Authority,* 17 BRBS 92 (1985), *aff'd,* No. 85-1222 (D.C. Cir., February 14, 1986) (unpublished).

In finding that employer violated Section 49, the administrative law judge viewed claimant's termination as a "discriminatory act," and employer's concededly standard practice of seeking voluntary-quit agreements from employees obtaining settlements as indicating the retaliatory intent necessary to Section 49. On appeal, employer contends that since it believed, at the time of claimant's termination, that claimant had consented to this action (i.e., that he had "voluntarily quit"), the discriminatory intent requisite to establishing a Section 49 violation never existed in the instant situation.

We reject this argument. Both of employer's officials who testified at the hearing repeatedly indicated that employer routinely seeks to procure employee's agreements to quit voluntarily when entering into settlements of their work-related claims. One of these officials even stated that the reason employer attempts to obtain such agreements from these individuals is that employees who have pursued and sought settlements of their disability claims are

generally regarded with disfavor. This evidence supports the administrative law judge's finding that employer's practice of inducing its injured employees to relinquish their jobs in exchange for lump-sum settlements of their claims "demonstrates generalized animus against longshore claimants as a class."

The Act provides a compensation scheme for injured workers, with benefits payable as provided in Section 8, 33 U.S.C. §908(i). *See* 33 U.S.C. §§915, 916. In this case, claimant settled his claim under Section 8(i). The agreement is specific as to its terms, and it makes no mention of an agreement by claimant to "voluntarily" quit. The deputy commissioner's approval of the settlement also makes no mention of an agreement to quit. The administrative law judge correctly found the evidence sufficient to establish that employer terminated claimant as a result of claimant's compensation claim and its settlement. This conclusion necessarily results from the evidence, since it is employer's admitted policy to retain no employee who enters into a settlement of his compensation claim. Employer's termination of claimant based on this record is clearly a violation of Section 49.

Employer, however, asserts that Section 49 was not violated because claimant agreed to quit as part of the settlement.[3] Even if employer did believe that claimant had consented to have his job terminated, whereupon employer removed claimant from its employ for only that reason, this consideration supports a finding that claimant's termination was related to his compensation claim and thus violated Section 49. The fact that any such consent would have been solicited and obtained only by virtue of claimant's having sought redress under the Act demonstrates that claimant's termination — whether of a voluntary or involuntary nature —

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[3] The demonstrated relationship between claimant's excercise of his rights under the Act and his termination would be strengthened, rather than undermined, by evidence suggesting that claimant voluntarity relinquished his job as a condition of the 1983 settlement. The evidence proffered by employer below and excluded by the administrative law judge, which allegedly establishes that claimant agreed to have his job terminated would thus fail to preclude a finding that Section 49 was violated in this case. Any error committed by the administrative law judge in ruling that this evidence is not admissible was thus at most, harmless. We accordingly need not address employer's challenge to this ruling.

was related, at least in part, to his having "claimed or attempted to claim compensation from ....employer," 33 U.S.C. §948a, and was thus prohibited under the Act. Under employer's admitted policy, in order to settle a compensation claim, claimant must give up his right to employment. Condoning such a policy, which we view as unconscionable, would clearly run counter to the beneficent purpose of the Act. While employer may not have intended that its policy violate Section 49, it does so nonetheless. We therefore affirm the administrative law judge's finding that employer's termination of claimant's job constituted a Section 49 violation.

The Decision and Order is accordingly affirmed.

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

CASE NOS.: 80-LHC-357
82-LHC-74

OWCP NOS.: 5-11266
5-32801

Robert T. Nance,

Claimant

v.

Norfolk Shipbuilding & Drydock Corporation,

Employer

Decided on April 4, 1986

DECISION AND ORDER

This proceeding involves a claim for disability compensation filed by Robert T. Nance pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Section 901 et seq.

A formal hearing was held in Hampton, Virginia on January 31, 1986, at which all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments

of the parties, applicable statutory provisions, regulations and pertinent precedent.[1]

FINDINGS OF FACT

I. *Identity and Background of the Claimant*

1. Robert T. Nance (the Claimant) resides at 1301 Stubin Street, Chesapeake, Virginia 23324. (Tr. 7).

2. Mr. Nance was employed by the Norfolk Shipbuilding and Drydock Corporation (Shipyard, Norshipco, or Employer) in the years 1947 through 1982, a period which included some intervals of unemployment. Claimant in the relevant period was employed as a first class electrician by Norshipco. (Tr. 7).

3. Claimant, who had brought several compensation claims against Norshipco, was laid off by the Shipyard on March 29, 1982. (Tr. 8; CX 1). Mr. Nance did not return to work at Norshipco and settled his compensation claim with Employer in January 1983. (Tr. 10; Findings 11-12 infra). At the time of layoff he was earning $9.03 per hour. (Tr. 25).

4. The injuries which were the subject of the January 1983 settlement were the following:

April 11, 1975 injury to knee
April 28, 1980 twisting of right leg
October 22, 1980 fall on right knee
April 3, 1981 back injury

As a result of such injuries Claimant had an arthroscopy of the right knee on November 1, 1977 and an exploration of the right patella on December 9, 1980. (EX 8).

5. The Shipyard paid Mr. Nance workers' compensation benefits in the period November 1980 through December 7, 1980. (Tr. 51).

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[1] The following citations to the record are used herein:
CX - Claimant's Exhibit
EX - Employer's Exhibit
Tr. - Transcript of the Hearing
Findings refer to the numbered findings in this decision.

6. In the agreed statement of facts which is part of the settlement agreement, the parties agreed that the following restrictions are applicable, "No climbing vertical ladders - prolonged squatting or kneeling on the right knee." The parties further agreed that Claimant can best perform work of the following nature:

> Any work which does not require climbing vertical ladders - claimant is an experienced electrician and can perform work in that trade.
>
> (EX 8)

7. While employed by Norshipco, Claimant had a good work record as far as absenteeism, tardiness and accepting overtime work were concerned. No disciplinary actions had been taken against Claimant. (Tr. 14-15).

8. W. B. Mask, Claimant's foreman when he gave Mr. Nance the layoff slip on March 29, 1982 stated that Claimant was getting old, that he worked too slowly and that the had restrictions. (Tr. 18-19).

9. While employed by Norshipco, Mr. Nance was for a period of time shop steward for the Boilermaker's International Union and a member of the Safety Committee. Among Mr. Nance's responsibilities in that position was the reporting of safety violations. (Tr. 19-20).

10. Prior to the settlement with Norshipco in 1983, Mr. Nance, in addition to his Longshore claims, had filed an age discrimination complaint with the Equal Employment Opportunity Commissioner (EEOC) and a union grievance in connection with his layoff in March of 1982. (Tr. 14). The EEOC complaint and union grievance were pending at the time of Claimant's settlement negotiations with the Shipyard.

11. On January 13, 1983 Claimant and Norshipco executed an Application for Approval of Agreed Settlement Section 8(i)" providing in pertinent part as follows:

> The above-named parties make the following statements of fact, and pursuant to the provisions of 33 U.S.C., 908(i) of the Longshoremen's and Harbor Workers' Compensation Act, agree upon the following proposed settlement of the employer's liability to the employee for the payment of compensation.

I. DISPUTED ISSUES(S)

Temporary total disability; permanent total disability; permanent partial disability; violation of § 49.

* * * *

III. AGREED SETTLEMENT

Section III of the "Agreed Settlement" provided as follows:

11. a.	Amount of proposed settlement 8(i)(A)	$25,000.00
b.	Amount of proposed settlement 8(i)(B)	—
c.	Attorney Fee (Application attached) ...	2,000.00 plus costs of $347.50

12. Other: Claimant has agreed as a condition of this settlement to withdraw all other claims pending against Norshipco in other forums, including an age discrimination claim which is pending before the Equal Employment Opportunity Commission (EEOC) and a grievance filed pursuant to the collective bargaining agreement. It is understood that no compensation order will be entered until such time as these other claims are withdrawn. In the event the EEOC does not permit withdrawal of the age discrimination claim, this settlement is null and void and no compensation order will be entered.

12. The Deputy Commissioner approved the parties' settlement agreement on the same date viz. January 13, 1983 as follows:

IV. *ACTION OF THE DEPUTY COMMISSIONER*

The Deputy Commissioner having considered the foregoing Application for Approval of an Agreed Settlement and the best interests of the employee

> concerned having been considered, as required by section 8(i)(A) and (B) of the Act, it is determined that payment of compensation and/or medical benefits pursuant to the said agreement would be for the best interests of the employee. A compensation order will be prepared by the Deputy Commissioner formally approving this agreed settlement and fixing the amount of the attorney fee. Payment is not to be made by the carrier or the employer until this order is filed in the Office of the Deputy Commissioner.

13. On March 7, 1983, Mr. Nance received a letter from Norshipco's insurance department advising that his health and life insurance had been terminated effective March 1, 1983. This was Claimant's first notification that he had been terminated by Employer. Mr. Nance in fact never received a formal separation notice from the Shipyard. (Tr. 11-12; CX 2).

14. Mr. Nance denies agreeing to voluntarily quit his job with Norshipco either verbally or in writing. (Tr. 25-26).

15. The settlement agreement contains no provision expressly or impliedly permitting Employer to discharge Claimant after consummation of the settlement (Finding 35 infra, EX 8).

16. As a result of his termination in March of 1983, Mr. Nance lost his health benefits, life insurance, vacation benefits, pension and paid holidays. Since going back to work at Norshipco in 1974, Mr. Nance had accumulated eight years of service to retirement. At the time of settlement, Claimant was in financial difficulty. (Tr. 23).

17. Mr. Nance, at the time of hearing, had a temporary job with the Norfolk Naval Shipyard which began in June 1985. Claimant is able to perform the duties of an electrician first class with Norshipco. He would like to return to Norshipco if his benefits were reinstated. (Tr. 26, 37-39).

18. In 1983, Mr. Nance earned no money other than that received for unemployment compensation and the $25,000.00 settlement award. In January 1984, Claimant began working for his son at $5.50 an hour as a truck driver. Mr. Nance continued working for his son until be began working to the Norfolk Naval Shipyard in June 1985. Except in cases of bad weather, Mr. Nance

generally worked 40 hours weekly while employed by his son. (Tr. 36-39). In the period 1983 through 1984, he made approximately $15,000 to $16,000 while working for his son. (Tr. 40-41).

19. At the Norfolk Naval Shipyard Claimant's starting wage was $9.40 an hour; at the time of hearing he was earning $9.81 an hour. (Tr. 44).

II. *Employer's Policy on Lump Sum Settlements, the Settlement of Mr. Nance's Claim and His Termination.*

20. Winston Smith is Director of Safety and Workmen's Compensation at Norshipco, a position he has held for nine years. (Tr. 50).

21. Mr. Smith and John B. King Norshipco's outside attorney, who is deceased, were involved in the settlement discussions leading up to the agreement of January 13, 1983. (Tr.57; Findings 31-32 infra).

22. In the course of those settlement discussions Mr. Smith discussed the amount of a possible lump sum settlement and Claimant's departure from Norshipco with Mr. Nance's attorney. (Tr. 57).

23. It is Norshipco's policy to secure an agreement by the employee to voluntarily quit in return for a lump sum settlement. Ninety-nine percent of Norshipco's lump sum settlements under the Longshore Act have in fact culminated in a voluntary quit. (Tr. 58).

24. Mr. Smith explained the reasons for this policy as follows:

> *All lump sum settlements have worked around the employee voluntarily quitting. The employee is usually unhappy at that point, and we want a clean slate.* The employee goes to work somewhere else. We arrive at a mutual agreement. We pay up, and that is it, and I close the case and get it off my books. (Emphasis supplied).
>
> (Tr. 58)

25. Linking an agreement for a voluntary quit as a *quid pro quo* for a lump sum settlement is "standard procedure" for

Norshipco. (Tr. 72-73).

26. When Mr. Smith determined that Claimant was not entitled to retirement, he raised the ante to $25,000. He explained:

> So at that point with several minutes of discussion, I threw it out that $25,000 was it. You know, he was not eligible [for retirement], *so throw the other $5000 in, but that was going to be it, and that he was going to go.* And the last sentence where I talk about going to management with it, you know, going to management not to get authority to approve it. I had authority to do it. It was strictly to let management know that we had reached an agreement or did not reach an agreement. (Emphasis supplied).
>
> (Tr. 60-61)

27. Mr. Smith felt that in the case of Mr. Nance because of the preceding history of this worker's compensation claim there may have been some friction and therefore he wanted Mr. Nance out of the company for a clean slate. (Tr. 77-78)[2].

28. Mr. Smith explained the reasons for this procedure as follows:

> Q. Why do you include that as part of the settlement?
>
> A. Because normally, the employee is unhappy. The medical information is becoming conflicting, that there are several doctors involved. You build a hostility situation where no matter what you do everybody is not going to be happy.

---

[2] JUDGE VON BRAND: Let me ask you this at this point. You are talking about a clean slate. If I understand you correctly is that what you are saying is that you felt that in view of the preceding history of this workers' compensation claim that there may have been some friction, and as a result you wanted Mr. Nance out of the company for a clean slate, is that correct?

THE WITNESS: That is correct.

JUDGE VON BRAND: This is because of the previous dealings on the claim, is that correct?

THE WITNESS: That is correct. So what you arrive at, a lump sum settlement to me means a clean slate for everyone, and off you go on with the rest of your life, and we close up our books, and that is it.

(Tr. 74)

29. In addition to the friction arising out of the workers' compensation claims, Mr. Smith desired to get rid of Claimant because he considered him to be a chronic complainer. In this connection he stated:

BY MR. BILISOLY:

Q. So to put it all on the table, one of the reasons to settle the case was to get rid of Mr. Nance, was it not?

A. Yes.

(Tr. 80-81)

30. Mr. Smith denied that he requested the personnel department to change Mr. Nance's records to a voluntary quit because he had filed a compensation claim. (Tr. 83).

31. A handwritten note by Mr. Smith of a conversation with John King on November 7, 1982 states:

Jack King states that he thinks Nance would take $20,000 and a VQ [voluntary quit] if he is eligible for company retirement.

(EX 1)

In fact Mr. Nance was not eligible for retirement since he had been employed continuously for only eight years. (Tr. 59-60).

32. On November 18, 1982, Mr. Smith made another handwritten notation of a conversation with Mr. King stating in

pertinent part "Nance will take ~~$25,000~~ VQ" and "Payment of Dr. K ends all injury claims plus EEOC charges plus arbitration." (EX 3; Tr. 63). At that point, Mr. Smith had agreed to an attorney's fee of $2,000.00 to Claimant's counsel. (EX 3; Tr. 65).

33. Mr. Smith felt he had a legal opinion from Mr. King that the reference to Section 49 under disputed issues in the settlement agreement was equivalent to an agreement on Claimant's part to accept a voluntary quit. (Tr. 75-76, 89, 93, 97).

34. Mr. Smith's belief that the settlement agreement included a voluntary quit by Claimant was based on his months of conversation about the settlement, the execution of the agreement, and discussion with his attorneys indicating that it was covered. (Tr. 92). Based on that understanding Mr. Smith advised his supervisor, James T. Wermeister, Norshipco's Director of Industrial Relations to remove Mr. Nance from the rolls as a voluntary quit. (Tr. 92, 98). Mr. Wermeister also understood the settlement to include a voluntary quit on the part of Claimant. (Tr. 105-106, 120).

35. Norshipco before implementing the termination of Mr. Nance had no written documentation indicating that Claimant had agreed to a voluntary quit. (Tr. 123).

DISCUSSION

Robert T. Nance, Sr. (the Claimant) sustained four injuries in the period April 11, 1975 through April 3, 1981. Norfolk Shipbuilding and Drydock Corporation (Norshipco) contested its liability with respect to certain of the injuries. In addition, claimant had filed an age discrimination claim with the Equal Employment Opportunity Commission, a Section 49 claim under the Longshoremen's and Harbor Workers' Compensation Act and a grievance under a union collective bargaining agreement. The EEOC claim, the Section 49 claim and the grievance related to Claimant's layoff on March 27, 1982. Mr. Nance has not returned to work at Norshipco since that date.

On January 13, 1983, Claimant and Norshipco signed an "Application for Approval of Agreed Settlement - Section 8(i)(a)." Among the disputed issues were "[t]emporary total disability; permanent total disability; permanent partial disability; violation of §49."

Section III of the "Agreed Settlement" provides as follows:

11. a.	Amount of proposed settlement 8(i)(A)	$25,000.00
b.	Amount of proposed settlement 8(i)(B)	—
c.	Attorney Fee (Application attached) . . .	2,000.00 plus costs of $347.50

12. Other: Claimant has agreed as a condition of this settlement to withdraw all other claims pending against Norshipco in other forums, including an age discrimination claim which is pending before the Equal Employment Opportunity Commission (EEOC) and a grievance filed pursuant to the collective bargaining agreement. It is understood that no compensation order will be entered until such time as these other claims are withdrawn. In the event the EEOC does not permit withdrawal of the age discrimination claim, this settlement is null and void and no compensation order will be entered.

The Deputy Commissioner on January 13, 1983 approved the agreement as in the best interests of Mr. Nance pursuant to the provisions of Section 8(i)(A) and (b) of the Act. (Findings 11- 12).

Once the EEOC charge and the grievance had been withdrawn, Norshipco implemented the settlement agreement by paying the agreed upon lump sum settlement and attorney fees. In addition, Norshipco dropped Mr. Nance from its employment rolls effective March 1, 1983 on the ground that the settlement included an undertaking on his part to voluntarily quit.

Mr. Nance, on the basis of his termination effective March 1, 1983, has filed the Section 49 claim in issue in this proceeding. Employer asserts the claim is barred by an alleged agreement as part of the settlement to voluntarily quit. Mr. Nance denies such an agreement. There is no written documentation of an agreement by Claimant to voluntarily quit in return for the $25,000.00 settlement. To demonstrate such an agreement, Employer would have to resort to evidence extrinsic to the written settlement agreement executed by the parties on January 13, 1983 and approved by the Deputy Commissioner on the same date.

The Parol Evidence Rule

The settlement agreement Form LS-471, as already noted, contains no provision expressly or impliedly permitting Employer to discharge Claimant after consummation of the settlement. Employer seeks to introduce evidence extrinsic to the written agreement to prove such an undertaking by Mr. Nance. This decision incorporates and reaffirms the prior pretrial ruling excluding such evidence:

> Employer urges that the LS-471 does not constitute the entire agreement of the parties and that it should be permitted to adduce evidence to show that Mr. Nance agreed to his post settlement discharge on a voluntary quit basis as a part of the settlement agreement. Claimant urges that such evidence is barred by the Parol Evidence Rule. The "rule requires, in the absence of fraud, duress, mutual mistake, or something of the kind, the exclusion of extrinsic evidence, oral or written, where the parties have reduced their agreement to an integrated writing." 4 Williston on Contracts § 631.
>
> Paragraph IV of the LS-471, "Action of the Deputy Commissioner," clearly contemplates that the complete agreement of the parties be reviewed as a prerequisite to approval. Absent such information, the Deputy Commissioner could not intelligently review the settlement with the "best interests" of the Claimant in mind.[3] Approval, moreover, according to Paragraph IV, is to be given on the basis of the "foregoing application." In short, the text of an LS-471 makes it clear that agreements extrinsic to that document are not to be considered in the approval process. It is apparent from the face of the LS-471 that it is intended to be the

---

[3] An agreement where a claimant agrees to give up his job as a *quo quid pro* for a lump sum settlement, is precisely the type of condition which must be reviewed in evaluating whether the agreement is in his best interests. The LS-471, on its face, requires that all parts of the settlement relevant to the best interests question be included in that document.

> complete and integrated statement of the agreement between Claimant and Employer. Nor are there any ambiguities in the document requiring resolution. The LS-471 must, on its face, be considered an integrated agreement incorporating into a single written memorial all prior negotiations. There is accordingly, a conclusive presumption that the LS-471 incorporates the whole contract and is the sole evidence of the agreement. Employer may not, therefore, adduce evidence to show that Claimant had as part of the settlement agreed to voluntary termination of his employment after the settlement in an attempt to vary the terms of the agreement. Employer's contention that the settlement bars this proceeding is rejected. (Order Designating Issues to be Tried in This Proceeding and Setting Hearing Date, October 29, 1985)

An employer's motivation in discharging an employee is, however, crucial to any Section 49 proceeding. The Parol Evidence rule although it precludes an attempt to vary the agreement by extrinsic evidence does not prohibit evidence bearing on the question of retaliatory intent. Accordingly, Employer's officials were permitted to testify concerning their understanding of the settlement agreement and the effect, if any, of such understanding, on the decision to discharge the Claimant.

Employer's Intent in Terminating Claimant

Prerequisite to prosecution of a Section 49 claim are proof of a discriminatory act by employer and proof that the discrimination was motivated by animus against the employee because of the filing of a claim under the Act. The second requirement is satisfied even if the employer's action is only partially motivated by the employee's exercise of his rights under the statute. Put another way, "an employer who discriminates against an employee both because the employee filed a compensation claim and because of other, independent reasons nonetheless violates section 49." *Geddes v. Benefits Review Board,* 16 BRBS 88 CRT, 90 CRT (D.C. Cir. 1984). The starting point in deciding this issue is the principle that Employer's intent may be inferred from the facts and

circumstances surrounding the discharge. *Curling v. Newport News Shipbuilding and Dry Dock Company,* 8 BRBS 770, 772 (1978).

Employer urges that Norshipco's responsible officials terminated Mr. Nance because they believed a voluntary quit was part of the settlement agreement. The record does demonstrate that Messrs. Smith and Wermeister based on oral communications with Claimant's counsel and their own outside counsel believed that a voluntary quit by Mr. Nance was included in the settlement. Particular reliance was placed on verbal communications with their own counsel, Mr. King. That, however, does not end the matter. The crucial consideration is the reasons for Norshipco's insistence on securing the voluntary quit as a part of the settlement agreement. The record on this point is revealing.

It is the Shipyard's policy, as a matter of standard procedure to secure an employee's voluntary quit as part of a lump sum settlement agreement. The reason is that, in Norshipco's view, the employee at that point is generally unhappy because of friction arising out of the claim process and Employer's desire for a clean slate. (Findings 24-25, 28). As Mr. Smith explained:

> Q. Why do you include that as part of the settlement?
>
> A. Because normally, the employee is unhappy. The medical information is becoming conflicting, that there are several doctors involved. You build a hostility situation where no matter what you do everybody is not going to be happy.
>
> JUDGE VON BRAND: This is because of the previous dealings on the claim, is that correct?
>
> THE WITNESS: That is correct. So what you arrive at, a lump sum settlement to me means a clean slate for everyone, and off you go on with the rest of your life, and we close up our books, and that is it.

Employer's standard policy of terminating employees as part of the lump sum settlement procedures because of friction or

hostility engendered by the claim process demonstrates generalized animus against longshore claimants as a class. Moreover, the record shows that in this case Employer specifically intended to seek a voluntary quit by Mr. Nance because of friction arising from the pursuit of his claim. As a result, Norshipco wanted him off the rolls for a clean slate. On this point the record shows:

> JUDGE VON BRAND: Let me ask you this at this point. You are talking about a clean slate. If I understand you correctly is that what you are saying is that you felt that in view of the preceding history of this Workers' Compensation claim that there may have been some friction, and as a result you wanted Mr. Nance out of the company for a clean slate, is that correct?
>
> THE WITNESS: That is correct.
>
> (Finding 27)

The record, accordingly compels the finding that Norshipco's processing of Claimant's voluntary quit was a discriminatory act engendered by his workers' compensation claim. The admission that Employer desired to get rid of Mr. Nance because of past friction arising from his compensation claim and the desire for a clean slate documents the retaliatory intent prerequisite to finding of a violation of Section 49. The fact that Employer may also have desired to terminate Mr. Nance for additional reasons such as chronic complaining does not vitiate the finding of violation. *Geddes v. Benefits Review Board, supra.*

There is an aura of unfairness surrounding a policy requiring financially distressed employees, as a part of the settlement process, to choose between disability compensation and their jobs. The consequences can be grave when that choice in addition to loss of employment also involves deprivation of retirement and health benefits. The record in this case, however, clearly demonstrates the discrimination and retaliatory intent prerequisite to a Section 49 violation. There is accordingly no need in this case to reach the more general question of whether a policy of conditioning settlement on voluntary termination can be reconciled

with the legislative intent underlying the Act.

Claimant is to be reinstated with back pay effective March 1, 1983, the effective date of his termination. Claimant has offered no proposed findings on the issue of back pay. Employer's factual contentions on this issue appear supported by the record. (Findings 3, 17, 18-19). Accordingly, back pay of $11,276.63 is awarded.[4]

Section 49 further provides that "[a]ny employer who violates this section shall be liable to a penalty of not less than $1,000.00 or more than $5,000.00, as may be determined by the deputy commissioner." Norshipco will be required to pay a penalty of $1,000.00 to the Deputy Commissioner in accordance with the foregoing provision of Section 49. See *Curling v. Newport News Shipbuilding and Dry Dock Company,* 8 BRBS 770, 773 (1978).

Attorney Fee

No application for an attorney's fee has been received from Claimant's counsel; consequently, none is awarded at this time. Thirty days is hereby allowed for the submission of such an application meeting the requirements of 20 C.F.R Sections 725.365 and 366. A service sheet showing that service has been made upon all parties including Claimant must accompany the application. The parties have 10 days following receipt of the application within which to file objections. The Act prohibits the changing of a fee in the absence of an approved application.

Earnings

[4] Claimant's last year at Norshipco $16,910.65
Employment with Claimant's son
January 1983 - December 1984 ..... $15,500.00/year
(approximate)

1983 - 1984 loss
(16,910.65 - 15,500.00 x 2
is accordingly $2,821.30
Loss for period December 1984 to
June 1985 is 8,455.33
Total lost wages $11,276.63

ORDER

IT IS ORDERED that:

1. Employer shall reinstate Claimant to his former position with back pay in the amount of $11,276.63.
2. Employer shall pay the Deputy Commissioner a penalty in the amount of $1,000.00 pursuant to the provisions of Section 49 of the Act.

THEODOR P. VON BRAND
Administrative Law Judge

Supreme Court, U.S.
FILED
JUN 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1648

In the Supreme Court of the United States

OCTOBER TERM, 1988

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,
PETITIONER

v.

ROBERT T. NANCE AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY G. THORN
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

JEFFREY A. HENNEMUTH
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether an employer who settles a compensation claim under the Longshore and Harbor Workers' Compensation Act violates the anti-discrimination provision of the Act by terminating the claimant's employment because of the employer's fear of friction and hostility associated with the claim.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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ROBERT T. NANCE AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-15a) is reported at 858 F.2d 182. The decision of the Benefits Review Board (Pet. App. 16a-21a) is reported at 20 Ben. Rev. Bd. Serv. (MB) 109. The decision of the administrative law judge (Pet. App. 22a-37a) is reported at 19 Ben. Rev. Bd. Serv. (MB) 115 (ALJ).

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1988. A petition for rehearing was denied on January 9, 1989 (Pet. App. 1a). The petition for a

writ of certiorari was filed on April 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Norfolk Shipbuilding and Drydock Corporation employed respondent Robert T. Nance as an electrician at various times from 1947 through March 1982 (Pet. App. 2a, 16a, 23a). Between 1975 and 1981, Nance filed several claims with the United States Department of Labor under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, seeking disability compensation from petitioner for workplace injuries to his knee, leg, and back (Pet. App. 23a). On January 13, 1983, petitioner and Nance agreed to settle Nance's claims for a lump-sum payment of $25,000, plus attorney's fees and costs (*id.* at 3a, 16a-17a, 23a-25a). The Labor Department's deputy commissioner promptly approved the settlement under Section 8(i) of the Act, 33 U.S.C. 908(i) (1982 & Supp. V 1987). See Pet. App. 3a-4a, 17a, 25a-26a. Nance received his lump-sum payment in February 1983 (*id.* at 17a).

On March 7, 1983, petitioner notified Nance by letter that his employer-sponsored health and life insurance had been cancelled effective March 1, 1983 (Pet. App. 4a, 17a, 26a). Since Nance was on layoff status at the time, that letter was his only formal notice that petitioner was terminating his employment (*ibid.*). Nance subsequently challenged that action by filing a discrimination complaint

against petitioner pursuant to Section 49 of the LHWCA, 33 U.S.C. 948a (1982 & Supp. V 1987). Pet. App. 17a.[1]

2. Petitioner attempted to introduce evidence at the administrative hearing that Nance had verbally agreed to his termination as part of the settlement of his LHWCA claims (Pet. App. 4a, 17a, 32a); Nance denied the existence of any such agreement (*id.* at 4a, 26a). The Department of Labor administrative law judge (ALJ) refused to admit petitioner's evidence on the ground that the written settlement application filed with the deputy commissioner (which made no mention of Nance's discharge) constituted the entire agreement between the parties (*id.* at 4a-5a, 17a, 32-33a).

The ALJ, however, allowed petitioner's officials to testify about their understanding of the settlement agreement and the impact, if any, of that understanding on the decision to terminate Nance's employment (Pet. App. 5a, 17a-18a, 33a). Those witnesses indicated that petitioner had followed a consistent policy of securing an

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[1] Section 49 of the LHWCA, 33 U.S.C. 948a (1982 & Supp. V 1987), provides in relevant part:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against any employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. * * * Any employer who violates this section shall be liable to a penalty of not less than $1,000 or more than $5,000, as may be determined by the deputy commissioner. * * * Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination * * * .

employee's voluntary termination as part of any lump-sum settlement of an LHWCA claim (*id.* at 5a, 19a-20a, 34a-35a). Petitioner based that policy on its desire to begin anew with a "clean slate" free of the hostility that a disputed benefit claim engendered (*ibid.*). In response to further questioning, petitioner's director of safety and workers' compensation admitted that there had been friction between petitioner and Nance because of the latter's history of LHWCA claims, and that petitioner had wished to be rid of Nance for that reason (*id.* at 5a, 35a).

Following the hearing, the ALJ ordered petitioner to reinstate Nance with back wages and to pay a civil penalty to the deputy commissioner (Pet. App. 37a). The ALJ found that several of petitioner's representatives believed Nance had agreed to quit as part of the settlement (*id.* at 34a) and further found that petitioner's insistence on securing a voluntary termination from Nance because of his history of workers' compensation claims demonstrated a retaliatory intent sufficient to violate Section 49 of the LHWCA (Pet. App. 35a). Since there was evidence of specific animus against Nance, the ALJ did not consider whether a general policy of conditioning settlements on voluntary termination would violate the Act (*id.* at 35a-36a).

3. The Benefits Review Board affirmed the ALJ's finding of a Section 49 violation, holding the evidence sufficient to establish that petitioner had discharged Nance as a result of his LHWCA claim (Pet. App. 16a-21a). The Board rejected petitioner's argument that it had not intended to discriminate against Nance because it believed that he had consented to his own termination (*id.* at 19a). The Board concluded that petitioner's

practice of routinely seeking voluntary termination agreements before settling LHWCA claims supported the ALJ's finding that petitioner had a general animus against all LHWCA claimants (*id.* at 19a-20a). Since petitioner discharged Nance even though the approved settlement agreement made no mention of a voluntary termination, the Board concluded that petitioner's decision was based solely on its "admitted policy to retain no employee who enters into a settlement of his compensation claim" (*id.* at 20a).

4. The court of appeals affirmed the Benefits Review Board's decision (Pet. App. 2a-10a). The court first concluded that under the LHWCA and applicable regulations, the written settlement application submitted to the deputy commissioner must include all agreements between the employer and the claimant. It accordingly held that the ALJ properly excluded parol evidence of a voluntary termination agreement. *Id.* at 7a-9a. The court then upheld the ALJ's finding of discriminatory intent. The court concluded that petitioner's general policy of seeking voluntary termination agreements and its specific desire to obtain such an agreement from Nance both were "highly probative as to whether Norfolk had the requisite discriminatory intent in discharging Nance" (*id.* at 9a). The court explained that petitioner's desire to "'clean the slate'" of friction or hostility arising from Nance's compensation claim was substantial evidence of discriminatory intent "[w]hether or not such an agreement was entered into" (*ibid.*).

Judge Murnaghan dissented (Pet. App. 10a-15a). He did not dispute that the written settlement submitted to the deputy commissioner constituted the entire agreement between the parties. He disagreed, however, with the

"finding of discriminatory intent under the facts of the present case" (*id.* at 12a).[2]

ARGUMENT

The court of appeals affirmed the decision of the Benefits Review Board and the ALJ that petitioner's termination of its employee was motivated by a discriminatory intent. That fact-based decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review accordingly is not warranted.

1. A discrimination claim under Section 49 of the LHWCA consists of two elements: (1) the employer must commit a discriminatory act; and (2) the discrimination must be motivated by animus against the employee because of his pursuit of rights under the LHWCA. *Holliman* v. *Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 761 (4th Cir. 1988); *Geddes* v. *Benefits Review Bd.*, 735 F.2d 1412, 1415 (D.C. Cir. 1984). The record in this case shows that petitioner had a firm policy against retaining employees who settled claims under the

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[2] We believe that the Director, Office of Workers' Compensation Programs, was a party in the court of appeals, even though he did not actively participate in the proceedings, and is therefore an appropriate respondent to the petition for a writ of certiorari under Rule 19.6 of this Court. See *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 485 (D.C. Cir. 1982) ("the Director, OWCP shall be named as federal party-respondent in all petitions for review brought under section 21(c) of the LHWCA, 33 U.S.C. § 921(c)"); 20 C.F.R. 802.410(b) ("[t]he Director * * * shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA"). But see *I.T.O. Corp.* v. *Benefits Review Bd.*, 542 F.2d 903, 909 (4th Cir. 1976), cert. denied, 433 U.S. 908 (1977).

LHWCA and that petitioner terminated Nance's employment immediately after settling his compensation claims. Indeed, petitioner's representatives expressly stated that they wanted Nance out of the company because his departure would "clean [the] slate" of the hostility caused by Nance's history of compensation claims (Pet. App. 5a, 28a n.2). Therefore, it is clear from the evidentiary record that Nance lost his job because of petitioner's animus against him for exercising his rights under the LHWCA.[3]

While petitioner does not dispute these factual findings, it nevertheless contends (Pet. 6-11) that the court of appeals erred by sustaining a charge of unlawful discrimination based solely on petitioner's "generalized" animus against LHWCA claimants as a class. That contention is incorrect. As indicated above, the court of appeals did not base its decision solely on petitioner's

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[3] Petitioner suggests (Pet. 6-7) that it did not have a discriminatory intent in this case because its representatives subjectively believed that Nance had agreed, as part of his LHWCA settlement, to quit voluntarily. The court of appeals, the Benefits Review Board, and the ALJ all rejected that argument. Indeed, the court of appeals expressly stated (Pet. App. 9a) that "[w]hether or not such an agreement was entered into," petitioner's testimony on its goal in seeking such an agreement was "substantial evidence of discriminatory intent."

Moreover, petitioner's workers' compensation representatives can reasonably be charged with knowledge of the Department of Labor's requirement that an LHWCA settlement must include a full description of the terms of the agreement. See Pet. App. 7a (describing statutory and regulatory provisions). They were not entitled to pursue a policy of terminating a claimant's employment in the face of a written settlement agreement that did not include that term.

general animus. It expressly relied, as did the ALJ, on petitioner's specific "desire to enter into such an agreement *in the case of Nance* to 'clean the slate' of friction or hostility associated with *his* claim" (Pet. App. 9a (emphasis added)). See *id.* at 34a-35a. The court recognized, as did the ALJ, that petitioner's general hostility toward LHWCA claimants provided *evidence* of petitioner's specific animus in this case. See *id.* at 9a, 33a-34a, 34a-35a.[4]

Petitioner cites no decision of this Court or any court of appeals (including the court below) holding that evidence of a general antipathy toward LHWCA claimants cannot be used as evidence to prove discriminatory intent in a particular case. Petitioner's reliance (Pet. 5, 7, 10-11) on *Holliman* and *Geddes* is entirely misplaced. Those decisions merely stand for the proposition that a discriminatory act prohibited by Section 49 of the LHWCA must result, at least in part, from the employee's filing of a compensation claim. Neither the Fourth Circuit in *Holliman* nor the D.C. Circuit in *Geddes* considered whether evidence of general animus may be used to prove unlawful intent.[5]

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[4] The court of appeals also recognized that the evidence was "highly probative" (Pet. App. 9a). Indeed, the testimony before the ALJ revealed that the "generalized" animus here was not some vague, unmanifested dislike for workers' compensation claimants, but a firm conviction that contested compensation claims generate such hostility on the part of petitioner's managers that the claimant must agree to leave the company in order to qualify for a settlement.

[5] As petitioner observes (Pet. 8-10), there is authority under other statutes (*e.g.*, the National Labor Relations Act, 29 U.S.C. 151 *et seq.*) that an employer's general hostility toward protected activity,

2. Petitioner also argues (Pet. 5, 11-14) that the court of appeals' decision requires review because it effectively holds LHWCA settlements that include voluntary termination agreements to be *per se* unlawful under the LHWCA and therefore conflicts with precedents favoring settlement of employment discrimination claims under other statutes. The decision below cannot support that argument, however, because the court of appeals specifically found it unnecessary to rule on whether all such agreements are unlawful. The court recognized that petitioner had a general policy of seeking voluntary termination agreements, but further stated:

> Because we conclude that the ALJ correctly excluded the proffered evidence of the alleged oral agreement, and because we conclude that there was substantial evidence to support the finding of a violation of § 49 of the Act, we do not address the broader question of whether the Board erred as a matter of law in holding Norfolk's general policy to be a violation of § 49.

Pet. App. 6a.[6] As we have explained, the written

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taken by itself, does not establish unlawful motivation. See, *e.g.*, *NLRB* v. *Selwyn Shoe Mfg. Corp.*, 428 F.2d 217, 223 (8th Cir. 1970); *Nix* v. *NLRB*, 418 F.2d 1001, 1006 (5th Cir. 1969). However, none of the cases cited by petitioner supports the contention that an employer's hostility toward a protected class, as manifested by a general policy or practice, cannot be used as *evidence* of the employer's motivation for action taken against a given individual.

[6] Petitioner is also mistaken in contending (Pet. 11) that the Board held voluntary termination agreements to be *per se* illegal. The Board stated only that petitioner's unyielding policy of requiring

settlement that the deputy commissioner approved did not incorporate a voluntary termination agreement. Thus, this case presents no occasion for considering the legality of such agreements.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY G. THORN
Acting Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
CHARLES I. HADDEN
Deputy Associate Solicitor
JEFFREY A. HENNEMUTH
Attorney
Department of Labor

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LHWCA claimants to relinquish their jobs in return for a settlement of their claims is unconscionable and contrary to the purposes of the Act (see Pet. App. 21a). The Board did not state that voluntary termination agreements are always illegal.

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